Montana State Library
3 0864 1003 9864 6

347.786
L73MEPA
1997

MONTANA ENVIRONMENTAL POLICY ACT

STATE PUBLICATIONS COLLECTION

NOV 23 2007

MONTANA STATE LIBRARY
1515 E. 6th AVE.
HELENA, MONTANA 59620

HANDBOOK

Montana
Environmental Quality Council
1995-1997

House Members

Vicki Cocchiarella
Dick Knox
Scott Orr
Bill Ryan
Debbie Shea
Bill Tash

Senate Members

Vivian Brooke
William Crismore
Steve Doherty
Lorents Grosfield
Ken Mesaros
Jeff Weldon

Public Members

Jerry Noble
Jerry Sorensen
Jeanne-Marie Souvigney
Greg Tollefson

Governor's Representative

Glenn Marx

EQC Staff

Todd Everts, Legislative Environmental Analyst
Sally Melcher, Administrative Assistant
Maureen Theisen, Research & Publications Assistant
Michael S. Kakuk, Staff Attorney
Kathleen Williams, Resource Policy Analyst

DISCLAIMERS

The MEPA Handbook should not be used as a legal reference. When in doubt, always refer to the statute (75-1-201) or your agency MEPA administrative rules. When making any legal judgements on adequacy or procedure completeness always consult your agency legal staff.

Copyright/Disclaimers

Copyright © 1991 by the Montana Environmental Quality Council, All rights reserved.

No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means (electronic, mechanical, photocopying, recording, or otherwise) without prior written permission from the Montana Environmental Quality Council.

Acknowledgments

The EQC Staff would like to thank the U.S. Forest Service, Region 1, for allowing us to sit in on their 1900-01 training sessions and to use their course materials. We would especially like to thank Cynthia Manning for all her help and guidance. Many of the figures, words, and ideas on environmental review in Section VI - VII are taken directly from the Forest Service's 1900-01 Training Manual. We want to also thank Sid Jenson of Shipley Associates for his enlightening training seminar on "Applying the NEPA Process." The Shipley Process was very helpful in formulating Section VI. Finally, we would like to thank the Forestry Division at the Department of State Lands for helping us to formulate a macro view of the MEPA implementation process, and to focus on the long term benefits of reaching out to agency personnel who actually implement MEPA on a daily basis.

Preface

Under the Montana Environmental Policy Act (MEPA), the staff of the Environmental Quality Council (EQC) has a statutory responsibility to assist state agencies in MEPA implementation and compliance. MEPA compliance in general has become a high profile process. State agencies have come under intense public scrutiny when grappling with complex MEPA issues that have significant environmental, economic, and public policy implications. The public generally has become highly sophisticated in calling state agencies to task for MEPA non-compliance.

In response to heightened public awareness and involvement in the MEPA process, many state agencies have recently renewed their efforts to re-educate personnel, re-prioritize programs and procedures, and revitalize their MEPA compliance strategies. The EQC staff has received numerous requests from state agencies for MEPA compliance assistance.

In order to better serve these agencies and to fulfill its own statutory responsibilities under MEPA, the EQC has initiated a long-term MEPA implementation project. A major component of this project is the development of a MEPA agency training seminar and handbook to assist both veteran and new agency personnel in MEPA implementation.

The MEPA Handbook is designed to function both as a training aid and a desk-top reference. Future periodic updates, clarifications, and MEPA implementation tips will supplement the three-ring binder handbook. The handbook is a culmination of efforts on the part of state and federal agency personnel, concerned citizens, legislators, and EQC staff. Suggestions, clarifications, and/or criticisms are always welcome.

Should you have any questions on the environmental review process do not hesitate to contact anyone at the EQC. It is our hope that the EQC be viewed as a MEPA process resource. It is the EQC's top priority to assist state agencies in utilizing the MEPA process to make better and more efficient decisions.

Environmental Quality Council
Room 106
State Capitol
Helena, Montana 59620
(406) 444-3742

Table of Contents

Page

Table of Figures . . . . . *i*

Abbreviations . . . . . *ii*

Glossary . . . . . *iii*

MEPA Decision Process Flowchart . . . . . *ix*

MEPA Environmental Review Process Flowchart . . . . . *x*

INTRODUCTION

SECTION I - MEPA Handbook Overview *1*
SECTION II - The Montana Environmental Policy Act *10*

ENVIRONMENTAL REVIEW PROCESS

SECTION III - General Framework for Environmental Review . . . *25*
SECTION IV - When is Environmental Review Required? *34*
SECTION V - What Form will the Environmental Review Take? . *41*
SECTION VI - How is the Environmental Review Accomplished? *45*
SECTION VII - What Level of Public Involvement is Appropriate in the Environmental Review Process? *86*
SECTION VIII - How can the Environmental Review Document be Used in Agency Decision-Making? *103*
SECTION IX - MEPA Administrative Matters: The Importance of Maintaining a Project Record *106*

APPENDICES

APPENDIX A: MEPA Statute *A-1*
APPENDIX B: MEPA Model Rules *B-1*
APPENDIX C: Model EA Checklist *C-1*
APPENDIX D: Environmental Document Content Checklists *D-1*
APPENDIX E: MEPA & NEPA: A Comparison and Analysis *E-1*
APPENDIX F: MEPA Case Law Review *F-1*
APPENDIX G: State Agency MEPA Contact List *G-1*

BIBLIOGRAPHY

MEPA NEWSLETTER UPDATES

Table of Figures

Page

Figure 1. MEPA IMPLEMENTATION PROJECT ELEMENTS 4
Figure 2. MEPA GOALS-OBJECTIVES-THEMES 6
Figure 3. ENVIRONMENTAL REVIEW DOCUMENTS RECEIVED BY EQC 14
Figure 4. MEPA STATUTORY ORGANIZATION 17
Figure 5. MEPA MISCONCEPTIONS AND REALITIES 18
Figure 6. MEPA'S TWIN OBJECTIVES 20
Figure 7. DECISION BUBBLE 21
Figure 8. THE MEPA UMBRELLA 24
Figure 9. CHICKEN CROSSING THE ROAD 26
Figure 10. MEPA PROBLEM SOLVING 28
Figure 11. MEPA'S INTERDISCIPLINARY APPROACH 31
Figure 12. GENERAL FRAMEWORK FOR ENVIRONMENTAL REVIEW 33
Figure 13. DEFINITION OF THE TERM "ACTION" 36
Figure 14. SIX SITUATIONS WHERE NO ENVIRONMENTAL REVIEW IS REQUIRED 38
Figure 15. HUMAN ENVIRONMENT 39
Figure 16. SIGNIFICANCE CRITERIA 43
Figure 17. EA vs. EIS: A SUBSTANTIVE COMPARISON 47
Figure 18. ELEMENTS OF ENVIRONMENTAL REVIEW 49
Figure 19.. BIG CUTTHROAT CREEK DINOSAUR DIG HYPOTHETICAL 51
Figure 20. BIG CUTTHROAT CREEK DINOSAUR DIG MAP 52
Figure 21. ELEMENTS OF A PURPOSE AND NEED STATEMENT 55
Figure 22. BIG CUTTHROAT CREEK PROPOSED ACTION 56
Figure 23. BIG CUTTHROAT CREEK PURPOSE AND NEED 58
Figure 24. STEPS IN ISSUE STATEMENT DEVELOPMENT 60
Figure 25. BIG CUTTHROAT CREEK PRELIMINARY ISSUES 62
Figure 26. BIG CUTTHROAT CREEK ISSUES ORGANIZED BY RESOURCE 64
Figure 27. BIG CUTTHROAT ISSUE STATEMENT FOR WATER QUALITY 67
Figure 28. ISSUE TRACKING SYSTEM 68
Figure 29. ELEMENTS OF THE AFFECTED ENVIRONMENT SECTION 70
Figure 30. AFFECTED ENVIRONMENT ILLUSTRATION FOR CUTTHROAT CREEK 71
Figure 31. COMPARING ALTERNATIVES 75
Figure 32. MEPA RELATIONSHIPS 77
Figure 33. DIRECT AND SECONDARY IMPACTS 78
Figure 34. CUMULATIVE IMPACTS EQUATION 80
Figure 35. CUMULATIVE IMPACTS EQUATION FOR BIG CUTTHROAT CREEK SEDIMENT LOADING 81
Figure 36. CAUSE AND EFFECT RELATIONSHIP FOR ONE ISSUE 83
Figure 37. INTERPRETING IMPACTS 85
Figure 38. PROCEDURAL REQUIREMENTS: EA vs. EIS 88
Figure 39. BENEFITS OF PUBLIC PARTICIPATION 93
Figure 40. PRINCIPLES OF PUBLIC INVOLVEMENT 94
Figure 41. DEVELOPMENT OF A PUBLIC PARTICIPATION STRATEGY 96
Figure 42. SCOPE 100
Figure 43. DECISION-MAKING 105
Figure 44. SAMPLE FILE RECORD INDEX 108

MEPA Handbook
Abbreviations

MEPA	**Montana Environmental Policy Act**
NEPA	**National Environmental Policy Act**
EA	**Environmental Assessment**
MEA	**Mitigated Environmental Assessment**
EIS	**Environmental Impact Statement**
DEIS	**Draft Environmental Impact Statement**
FEIS	**Final Environmental Impact Statement**
PEIS	**Programmatic Environmental Impact Statement**
ROD	**Record of Decision**

MEPA Handbook
Glossary

ACTION

An "action" means an activity that is undertaken, supported, granted, or approved by a state agency. Examples of state governmental actions include:

(1) Projects or activities undertaken by a state agency:
- o highways/roads
- o wildlife enhancement
- o state timber sales
- o land acquisition
- o development of a management plan
- o legislation
- o state building projects
- o state park development
- o rule-making activities

(2) Projects or activities supported or funded by a state agency either singly or in combination with one or more other state agencies through:
- o contract
- o grant
- o subsidy
- o loan
- o any other form of funding activity

(3) Projects or activities involving a grant of entitlement or approval by a state agency:
- o grazing lease
- o cloud seeding permit
- o hard rock mining operations permit
- o licensing of water well contractors
- o water pollution discharge permit
- o roadside zoo permit
- o meat packing plant license

Note: for further clarification of the term "action" see MEPA Model Rules Section II (1).

ADMINISTRATIVE ACTIONS

An exempt action not requiring review under MEPA that involves routine, clerical or similar functions of a department, including but not limited to administrative procurement, contracts for consulting services, and personnel actions. (MEPA Model Rules Section III (5) (b))

ALTERNATIVE

A course of action or an alternate approach that would appreciably accomplish the same objective or result as the proposed action. A viable or reasonable alternative is one that is realistic, technologically available and bears a logical relationship to the proposal being evaluated. There are three interrelated and conjunctive categories of "alternatives":

(1) **Project-Oriented Alternatives**- Those alternatives not incorporated into a proposed action by the applicant or agency prior to preparation of the environmental document. These include:
- o design parameters
- o mitigation measures
- o other control measures

(2) **"No Action" Alternative**- The "no action" alternative requires either an analysis where there is no change from the current status quo or an evaluation of environmental conditions where the proposed action does not take place. The "no action" alternative provides a baseline condition or point of reference for evaluating environmental effects.

(Continued on next page)

ALTERNATIVE (Continued)

(3) Programmatic Alternatives- For state initiated programs or series of actions the governmental entity must generate alternatives that evaluate different programs or series of activities that would accomplish other objectives or a different use of resources.

For further clarification of the term "alternative," see MEPA Model Rules Section II (2).

AGENCY

Any state governmental body, office, department, board, quasi-judicial board, council, commission, committee, bureau, section or any other unit of state government that can take actions.

APPLICANT

An "applicant" is a person or any other entity who applies to an agency for a grant, loan, subsidy, or other funding assistance, or for a lease, permit, license, certificate, or other entitlement for use or permission. (Model Rule II (4)).

CATEGORICAL EXCLUSION

A type of action specified in the MEPA Model Rules which does not individually, collectively, or cumulatively require an EA or EIS as determined by rulemaking or programmatic review and adopted by an agency (Model Rule II (5)). Examples of categorical exclusions include:

- o installation of traffic signals
- o rest area improvements
- o highway safety improvements

COMPENSATION

The term "compensation" refers to the replacement or provision of substitute resources or environments to offset an impact on the quality of the human environment. For purposes of determining the significance of impacts, compensation may not be considered. (MEPA Model Rule II (6)).

CUMULATIVE IMPACTS

Generally stated, "cumulative impacts" are impacts which may be negligible or minor for a specific project or action under consideration, but collectively (many similar projects or actions) or incrementally may result in significant impacts.

Specifically, under the MEPA Model Rules, the concept "cumulative impacts" refers to the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location and generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures (MEPA Model Rule II (7)).

DIRECT IMPACTS

Direct or primary impacts are those that occur at the same time and place as the triggering action. Direct impacts typically occur at a project site where there is a direct cause and effect relationship. An example of a direct impact would be the loss of vegetation caused by earth removal for new road construction. Direct or primary impacts are generally easier to detect and measure than secondary or cumulative impacts.

EMERGENCY ACTIONS

"Emergency Actions" are those that an agency may take or permit in an emergency situation without preparing an EIS. Emergency actions must be limited to those actions immediately necessary to control the impacts of the emergency.

Note that within 30 days following the action, the agency must document the need for, and the impact of, the emergency action. Emergency actions are actions that include, but are not limited to:

(1) projects undertaken, carried out, or approved by the agency to repair or restore property or facilities damaged or destroyed as a result of a disaster when a disaster has been declared by the governor or other appropriate governmental agency;

(2) emergency repairs to public service facilities necessary to maintain service; and

(3) projects, whether public or private, undertaken to prevent or mitigate immediate threats to public health, safety, welfare, or the environment.

(MEPA Model Rules Sections II (8) and XIX)

ENVIRONMENTAL ASSESSMENT (EA)

An environmental assessment is a written analysis of a proposed action to determine whether an Environmental Impact Statement (EIS) is required or to serve one or more of the following purposes:

- o to ensure that the agency uses the natural and social design arts in planning and decision-making;
- o to assist in the evaluation of reasonable alternatives;
- o to develop conditions, stipulations or modifications to be made a part of a proposed action
- o to determine the need to prepare an EIS through an initial evaluation and determination of the significance of impacts associated with a proposed action;
- o to ensure the fullest appropriate opportunity for public review and comment on a proposed action;
- o to examine and document the effects of a proposed action on the quality of the human environment; and
- o to provide the basis for public review and comment whenever statutory requirements do not allow sufficient time for an agency to prepare an EIS.

(MEPA Model Rules II (9) and III (2)).

ENVIRONMENTAL ASSESSMENT CHECKLIST

An environmental assessment checklist is a standard form of an EA developed by an agency for actions that generally produce minimal impacts. The environmental assessment checklist must meet all preparation and content requirements for environmental assessments under the MEPA Model Rules (V & VI) and serve any of the purposes of an EA noted in Rule III (2) (a).

ENVIRONMENTAL IMPACT STATEMENT (EIS)

An EIS is a detailed written statement required by MEPA (section 75-1-201, MCA) which, in general, contains a description of the proposed action, its physical setting, potential impacts the action may have on the human environment, ways to minimize the impacts, and a discussion of reasonable alternatives including the no action alternative. The EIS also serves as a public disclosure of agency decision-making. For a more detailed explanation of the requirements for an EIS see section 75-1-201, MCA and the MEPA Model Rules, Rule III, VIII, IX -XXVI. Note that there are several forms of Environmental Impact Statements:

ENVIRONMENTAL IMPACT STATEMENT (Continued)

(1) Draft EIS-- this is a preliminary detailed written statement that facilitates public review and comment. For a more detailed explanation see section 75-1-201, MCA, and the MEPA Model Rules, Rule IX.

(2) Final EIS-- this is a completed, detailed written statement consisting of a summary of major conclusions and supporting information from the draft EIS, responses to substantive comments received on the draft EIS, a list of all sources of written and oral comments on the draft EIS and any revisions made to the draft EIS. The Final EIS must also include any recommendation, preferred alternative, or proposed action together with an explanation of the reasons for making that decision. For further clarification note 75-1-201, MCA, and the MEPA Model Rules, Rule XI.

(3) Joint EIS-- this is an EIS that is prepared jointly by more than one agency, either state or federal, when agencies are involved in the same or a closely related proposed action. For further clarification note MEPA Model Rules, Rules XV and XVI.

EXEMPT ACTIONS

A category of actions that do not require review under MEPA because of their special nature. Exempt actions include:

- o administrative actions;
- o minor repairs and maintenance of existing facilities;
- o investigation and enforcement activities;
- o ministerial actions; and
- o actions that are primarily social or economic in nature.

(MEPA Model Rule III (5)).

ENVIRONMENTAL QUALITY COUNCIL (EQC)

The EQC is an agency of the legislative branch of state government. Created in 1971 by the Montana Environmental Policy Act (MEPA), the EQC coordinates and monitors state policies and activities that affect the quality of the human environment. The EQC does not have any regulatory power. It serves exclusively in an advisory capacity. Thirteen Montana citizens make up the EQC. Four are state senators; four are state representatives; four are members of the public; and one, a non-voting member, represents the governor. The EQC is designed to be bipartisan. For further clarification note 75-1-301 et. seq., MCA.

HUMAN ENVIRONMENT

The "human environment" includes, but is not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment. As the term applies to the agency's determination of whether an EIS is necessary (see MEPA Model Rule III(1)), economic and social impacts do not by themselves require an EIS. However, whenever an EIS is prepared, economic and social impacts and their relationship to the biological, physical, cultural and aesthetic impacts must be considered. (MEPA Model Rule II (12)).

LEAD AGENCY

The single state agency that has primary authority for committing the government to a course of action or the agency designated by the governor to supervise the preparation of a joint environmental impact statement or environmental assessment. (MEPA Model Rule II (13)).

MINISTERIAL ACTION

An exempt action under MEPA in which the agency exercises no discretion, but rather acts upon a given state of facts in a prescribed manner.

An example of a ministerial act would be the issuance of a fishing license. If a specific person qualifies as a resident of Montana, if the prescribed fee has been paid, and all other conditions have been met (e.g., license quotas, no past criminal fisheries activities, etc.) a license must be issued. The agency has no discretion and is acting in a prescribed manner when it issues the license. Therefore, the act of "issuance" is not reviewed under MEPA.

The agency, however, does not act ministerially when it descretionally makes a decision as to the number and types of licenses it issues. This act (e.g., the act of promulgating fishing regulations) is technically subject to MEPA review. (MEPA Model Rules Section III (5) (e)).

MITIGATED EA

As an alternative to preparing an EIS on a proposed action that has significant impacts, a state agency may prepare a "mitigated" EA if the significant impacts appear to be mitigable below the level of significance through design, or enforceable controls or stipulations or both imposed by the state agency or other agencies. In order for a "mitigated" EA to suffice, the agency must insure that: (1) all impacts have been identified; (2) all impacts can be mitigated below the level of significance; and (3) no significant impact is likely to occur. The agency can not consider compensation for purposes of determining that impacts have been mitigated below the level of significance. (MEPA Model Rules Sections III (4), V (2) and VI (4)).

MITIGATION

"Mitigation" is a measure(s) designed to reduce or prevent undesirable effects or impacts of the proposed action. The mitigation measure(s) must be enforceable by the agency or by some other government agency. Specifically, mitigation under the MEPA Model Rules means:

- o avoiding an impact by not taking a certain action or parts of an action;
- o minimizing impacts by limiting the degree or magnitude of an action and its implementation;
- o rectifying an impact by repairing, rehabilitating, or restoring the affected environment; or
- o reducing or eliminating an impact over time by preservation and maintenance operations during the life of an action or the time period thereafter that an impact continues. (See MEPA Model Rules II (14) and V (2)(h))

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

The federal counterpart of MEPA which applies only to federal actions.

PRIMARY IMPACT

See **Direct Impacts**

PROGRAMMATIC REVIEW

An analysis (EIS or EA) of the impacts on the quality of the human environment of related actions, programs, or policies. (MEPA Model Rule II (15))

RESIDUAL IMPACT

An impact that is not eliminated by mitigation. (MEPA Model Rule II (16))

SCOPE

"Scope" is the range of reasonable alternatives, mitigation, issues, and potential impacts to be considered in an EA or EIS. The term "scoping" is the process that an agency goes through in order to define the scope of the environmental review document. (MEPA Model Rule II (17)).

SECONDARY IMPACT

An impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action. Secondary impacts are those that occur at a later time or distance from the triggering action.

For example, a 100 acre parking lot is being proposed in prime purple orangutan habitat. The direct or primary impact will be a loss of 100 acres of purple orangutan habitat. The secondary impact may be a decrease in purple orangutan populations over time. (MEPA Model Rule II (17)).

SIGNIFICANCE

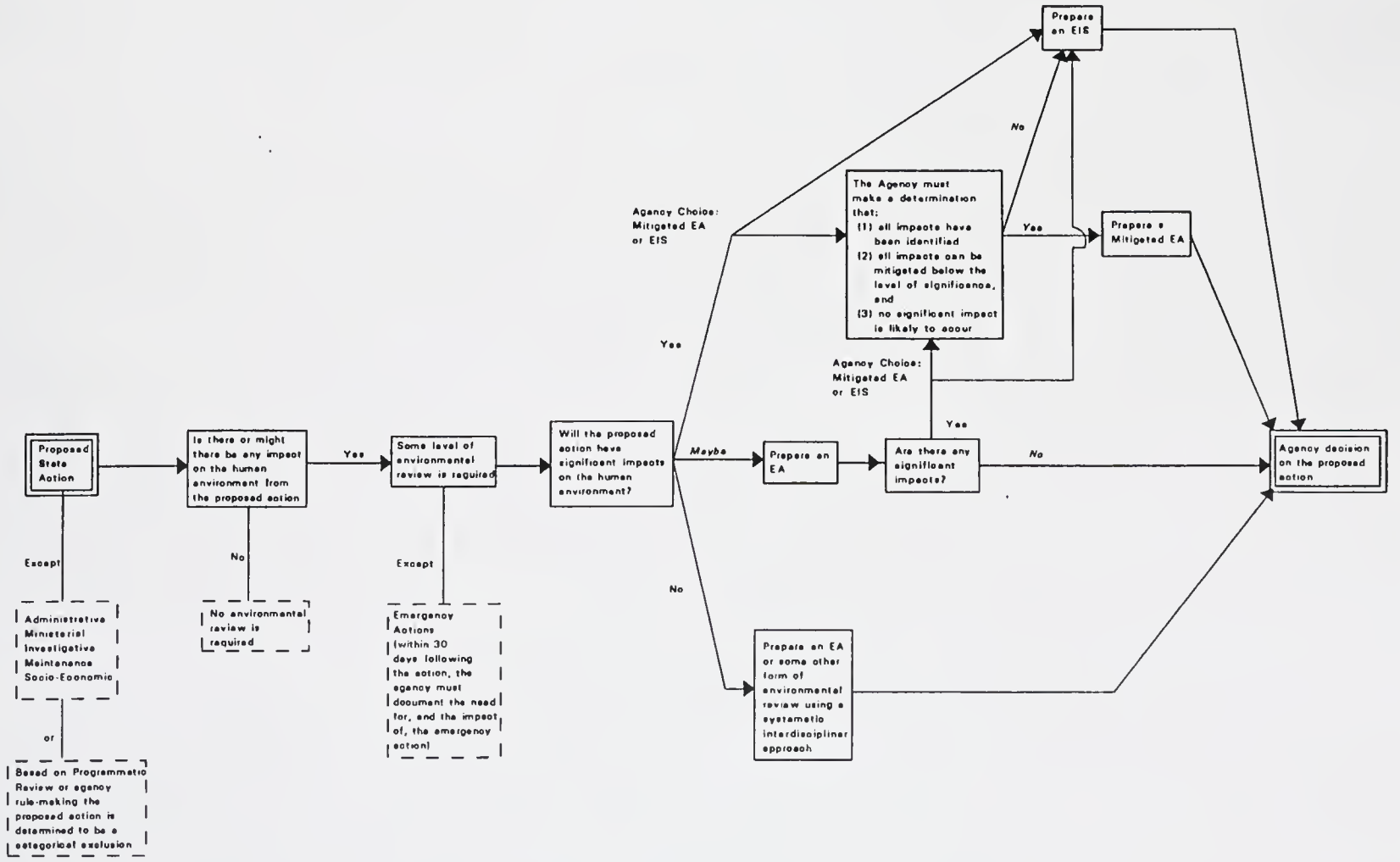
"Significance" as used in MEPA is a process of determining whether the impacts of a proposed action are serious enough to warrant the preparation of an EIS. "Significance" as it is applied requires state agencies to evaluate the proposed action's potential direct, secondary and cumulative impacts in terms of context (place or location) and intensity (scope or magnitude). An impact may be adverse, beneficial or both. If none of the adverse impacts are significant, an EIS is not required. Note, however, an EIS is required if an impact has a significant adverse effect, even if the agency believes that the effect on balance will be beneficial. The MEPA Model Rules provide the following context and intensity criteria that must be considered in determining the significance of each impact on the quality of the human environment:

- o severity, duration, geographic extent, and frequency of occurrence of the impact;
- o the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;
- o growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;
- o the importance to the state and to society of each environmental resource or value that would be affected;
- o any precedent that would be set as a result of an impact of the proposed action that would commit the agency to future actions with significant impacts or a decision in principle about such actions; and
- o potential conflict with local, state, or federal laws, requirements, or formal plans. (MEPA Model Rule IV).

TIERING

"Tiering" refers to the coverage of general matters in broader environmental review documents with subsequent narrower statements or environmental analysis incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.

MEPA DECISION PROCESS FLOWCHART


Proposed State Action
Except
Administrative
Ministerial
Investigative
Maintenance
Socio-Economic
or
Based on Programmatic Review or agency rule-making the proposed action is determined to be a categorical exclusion
Is there or might there be any impact on the human environment from the proposed action
No
No environmental review is required
Yes
Some level of environmental review is required
Except
Emergency Actions (within 30 days following the action, the agency must document the need for, and the impact of, the emergency action)
Will the proposed action have significant impacts on the human environment?
Maybe
Prepare an EA
Are there any significant impacts?
No
Yes
Agency Choice: Mitigated EA or EIS
The Agency must make a determination that:
(1) all impacts have been identified
(2) all impacts can be mitigated below the level of significance, and
(3) no significant impact is likely to occur
Yes
Prepare a Mitigated EA
No
Prepare an EIS
Agency Choice: Mitigated EA or EIS
Yes
No
Prepare an EA or some other form of environmental review using a systematic interdisciplinary approach
Agency decision on the proposed action

Introduction

SECTION I

Handbook Overview

* MEPA Implementation Project

* Training Goals/Objectives/ Themes

* Handbook Content Summary

SECTION I - MEPA Handbook

The MEPA Implementation Project

Background

Upon its enactment, the Montana Environmental Policy Act (MEPA) created a thirteen member Environmental Quality Council (EQC). The EQC is a legislative agency that coordinates and monitors state policies and activities that affect the quality of the human environment. While legislative status has given the EQC an advisory role without regulatory authority, it has insured the EQC's independence and non-partisan status in promoting effective MEPA implementation. Since 1971, EQC staff and council members have worked closely with state agencies to encourage proper implementation of MEPA. Each natural resource agency now operates under uniform rules specifying procedures for the environmental review of proposed state actions (see cross-reference index for rule citations in Appendix B).

Although the Legislature has not made major revisions to MEPA since its passage, agency implementation has been a dynamic process. An ever-changing regulatory environment coupled with significant personnel turnover in some agencies over the years has resulted in a lapse of institutional memory as to how to effectively implement MEPA's requirements.

In 1991, the Legislature allocated the EQC additional personnel in order to better assist state agencies in MEPA implementation and compliance. The EQC staff has embarked on a comprehensive long term agency MEPA implementation and training process. Instead of constantly reacting to MEPA distress calls or reviewing and critiquing agency MEPA process implementation after the fact, we decided to take a proactive approach and train state agency personnel in proper, effective, and efficient MEPA implementation.

Why a proactive approach? Because up front training leads to informed and successful agency decisions, enhances agency credibility with the public, decreases mistakes that can lead to legal challenges, and increases efficiency which in turn decreases state administrative costs. The bottom line is that up front education saves time and money and leads to informed decisions.

The goal of this project is to to assist state agency personnel in effectively and efficiently implementing the Montana Environmental Policy Act.

Project Description

The MEPA implementation project consists of five elements:

(1) Meet with state agencies to set up internal agency training programs.

(2) Publish and distribute a MEPA process handbook and desk-top reference for state agency personnel.

(3) Conduct EQC staff facilitated training seminars on general MEPA implementation.

(4) Revise and computerize the EQC document review system so that every MEPA document the EQC receives is recorded and indexed on a data-base

system. Each document will be reviewed by staff with constructive feed-back being provided to state agency personnel when appropriate.

(5) Establish a permanent and fully staffed MEPA liaison position within the EQC to assist agency personnel with MEPA implementation and compliance problems.

(6) Establish the George Darrow MEPA Award to be presented by the EQC to honor state agency excellence in implementation of the Montana Environmental Policy Act.

Project Update

As of the printing of this second edition, we have trained 391 state agency personnel from the Departments of Health and Environmental Sciences, Fish, Wildlife, and Parks, Natural Resources and Conservation, and State Lands. Department of State Lands Forestry Division and Fish, Wildlife, and Parks have each developed their own internal training programs. Over four hundred MEPA Handbooks are now in circulation. Our MEPA document review system is fully computerize and the MEPA staff liaison position is in place providing constructive feed-back on agency MEPA documents. In November of 1992 the Council awarded the first George Darrow MEPA award to the Forestry Division of the Department of State Lands for its commitment and innovation in MEPA compliance.

MEPA IMPLEMENTATION PROJECT ELEMENTS

(1) Internal Agency Training Programs

(2) The MEPA Handbook

(3) EQC General MEPA Training Seminars

(4) EQC Document Review System

(5) EQC MEPA Liaison

(6) George Darrow MEPA Award

Figure 1

SECTION I - MEPA Handbook

MEPA Training Goals/Objectives/Themes

Training Goals

The MEPA training seminar has two goals. By the end of the seminar you will:

(1) Know what MEPA requires; and

(2) How to effectively use MEPA as a problem solving tool.

This training seminar will demonstrate that MEPA is not another paper-pushing, jump through the hoops bureaucratic exercise. It is a legitimate tool that you can use to arrive at a sound and defensible decision. We want you to leave this training seminar with the understanding that MEPA is another tool to put into your tool-kit to effectively and efficiently carry out your job responsibilities.

Training Objectives

So what will you actually learn from the MEPA Training Seminar? By the end of this seminar you will be able to:

(1) describe the purpose and meaning of MEPA;

(2) determine whether the MEPA environmental review process even applies to the action you are contemplating;

(3) make an informed decision as to what level of environmental review is appropriate for the action you are taking;

(4) conduct an environmental analysis;

(5) document (or write) that analysis;

(6) make reasonable conclusions as to the level of public involvement that is typically required and/or appropriate under MEPA for the action you are taking; and

(7) create a project record.

The training seminar will provide you with a general overview of how to comply with MEPA. This seminar will not tell you how to best implement MEPA; that is an agency decision that only you can make. The EQC staff does not have the expertise that you have in your specific programs and is not faced with making the day to day decisions that you have to make. The ultimate challenge for this training seminar is to adapt the EQC's broad perspective on MEPA implementation to your specific needs.

Training Seminar Themes

Themes that will be reinforced throughout the training seminar include:

* **Informed/Successful Decisions**
* **No Surprises**
* **Agency Credibility**
* **Common Sense**

MEPA GOALS-OBJECTIVES-THEMES

Training Seminar Goals:

* *Know What MEPA Requires*

* *How to Use of MEPA as an Effective Problem Solving Tool*

Training Seminar Objectives:

Participants will be able to:

* *Describe the Purpose and Meaning of MEPA*

* *Assess the adequate level of Public Participation that is Typically Required and/or Appropriate*

* *Make a Determination as to Whether MEPA Environmental Review is Required for a Particular Action*

* *Make an informed decision as to What Level of Environmental Review is Appropriate for the Action Being Taken*

* *Conduct an Environmental Review Analysis*

* *Document (or write) that Analysis*

* *Create a Project Record*

Training Seminar Themes:

* *Informed and Successful Decisions*

* *No Surprises*

* *Agency Credibility*

* *Common Sense*

Figure 2

SECTION I - MEPA Handbook

MEPA Training Seminar Content

SECTION I - MEPA HANDBOOK OVERVIEW

This section describes the MEPA Implementation Project, explains the training goals, sets out the performance objectives of the training seminar and introduces the seminar themes to be referred to throughout the training session. This section also describes the training seminar content.

SECTION II - THE MONTANA ENVIRONMENTAL POLICY ACT

This section introduces the guiding principles and goals of the Montana Environmental Policy Act through review of the legislative history, statutory analysis, and case law review. This section also sums up the essential meaning of MEPA.

SECTION III - GENERAL FRAMEWORK FOR ENVIRONMENTAL REVIEW

This section explores the problem-solving mechanisms that MEPA intentionally propels the reviewer to undertake. This section discusses the importance of the interdisciplinary approach required by MEPA. It also introduces a general framework of questions that should be asked each time an agency takes an action that may trigger MEPA.

SECTION IV - WHEN IS ENVIRONMENTAL REVIEW REQUIRED?

This section delineates what agency actions are subject to MEPA review and identifies those specific actions that are exempt or excluded from MEPA review.

SECTION V - WHAT FORM WILL THE ENVIRONMENTAL REVIEW TAKE?

This section discusses the criteria that agency personnel must use in determining the type of environmental review (EA, Mitigated EA, or EIS) that will be performed.

SECTION VI - HOW IS THE ENVIRONMENTAL REVIEW PROCESS ACCOMPLISHED?

This comprehensive section explains and illustrates the fundamental elements of the environmental review process. It illustrates the substantive similarities and differences between an EA, Mitigated EA, and an EIS. It also discusses how to: (1) draft a statement of the proposed action; (2) identify relevant issues related to the proposed action; (3) formulate reasonable alternatives to the proposed action; (4) identify and analyze the impacts of the proposed action; and (5) evaluate appropriate mitigation measures.

SECTION VII - WHAT LEVEL OF PUBLIC INVOLVEMENT IS APPROPRIATE?

This section discusses the procedural requirements for pubic involvement. It also provides a methodology for determining the adequate level of public involvement for a given activity. It also explains the concept of scoping

MEPA Training Seminar Content (continued)

and how to devise a public participation strategy for a proposed action.

SECTION VIII - HOW CAN THE MEPA DOCUMENT BE UTILIZED IN AGENCY DECISION-MAKING?

This section explains when a record of decision (ROD) is required and what a ROD should contain. It illustrates how a typical environmental review document can be used to make an informed decision.

SECTION IX - MEPA ADMINISTRATIVE MATTERS: THE IMPORTANCE OF MAINTAINING A PROJECT RECORD

This section discusses why maintaining a project record is important. It illustrates how to efficiently construct and maintain a project record.

APPENDIX A - THE MONTANA ENVIRONMENTAL POLICY ACT

This appendix is a copy of the Montana Environmental Policy Act.

APPENDIX B - THE MONTANA ENVIRONMENTAL POLICY ACT MODEL AGENCY ADMINISTRATIVE RULES

This appendix is a copy of the Montana Environmental Policy Act Model agency administrative rules adopted by most state agencies in 1988. This appendix also provides a cross reference table for agency rule citations.

APPENDIX C - MODEL EA CHECKLIST

This appendix explains the Environmental Assessment (EA) Checklist process. It also provides a model EA Checklist.

APPENDIX D - ENVIRONMENTAL DOCUMENT CONTENT CHECKLISTS

Agency administrative MEPA rules and the statute require that environmental review documents contain specific review procedures. This appendix compiles those legal requirements into a checklist for each environmental review document to help ensure that the reviewer has not inadvertently omitted any of those requirements. Always refer to your administrative MEPA rules to ensure the document has meet your individual agency legal requirements.

APPENDIX E - NEPA AND MEPA: A COMPARISON

Appendix F analyzes the similarities and differences between the National Environmental Policy Act and the Montana Environmental Policy Act.

APPENDIX F - MEPA CASE LAW

This appendix compiles all of the Montana Supreme Court decisions on MEPA as well as Attorney General Opinions. It also includes brief summaries for each opinion.

MEPA Training Seminar Content (continued)

APPENDIX G - MEPA AGENCY PERSONNEL RESOURCE CONTACT LIST

This appendix compiles all the people in state government who work with or provide information for MEPA review.

SECTION II
The Montana Environmental Policy Act

* Historical Review of MEPA and the Implementation Process

* Purpose and Meaning of MEPA

* The Connection Between MEPA and Agency Statutory and Regulatory Mandates

SECTION II - MEPA Handbook

Historical Review of MEPA

Introduction

This subsection is designed to provide a historical frame of reference for MEPA implementation and compliance. It reviews the legislative history, court interpretations, and the historical agency implementation of MEPA. The training objective for this section includes a working knowledge of legislative, judicial and agency implementation history of MEPA.

Legislative History

The Montana Environmental Policy Act's (MEPA) legislative history provides an insightful perspective to what the 41st Legislature and Montana citizens perceived as priorities during the 1971 session. MEPA's legislative history also clarifies, in a very limited way, what the legislature's goals and objectives for MEPA were.

Concern for Montana's environment was self evident during the 1971 session of the state legislature. Numerous bills and resolutions involving littering, wilderness, a beverage container tax, recycling, water quality, mine permitting, and environmental protection were introduced and debated. A resolution for a new constitutional amendment stating that all Montanans have an inalienable right to a clean and healthful environment was debated during the '71 session and eventually adopted and ratified in 1972.
While most of the other legislative measures focused on specific, single, environmental issues, MEPA addressed the entire range of environmental concerns and directed an integration and coordination of various other environmental policies, programs, and responsibilities.

Although introduced and debated intentionally as a separate bill unto itself, MEPA was in reality one of a number of interrelated bills concerning environmental policy and protection. One of its un-intentioned companion bills--the Montana Environmental Protection Act (cited hereafter as the Protection Act) would have substantively executed the policies set forth in MEPA.

In its final form, the Protection Act declared that "a public trust exists in the natural resources of this state" and that those "natural resources should be protected from pollution, impairment or destruction." To enforce this trust the Protection Act would have allowed anyone, including non-residents, to sue the state for failure to perform any legal duty concerning the protection of the air, water, soil and biota and other natural resources from pollution, impairment or destruction.

The Protection Act generated much public controversy. Newspapers across the state ran articles on the potential positive and negative impacts of the bill. Committee reports overflowed with polarized testimony from the environmental community and industry.

In contrast, MEPA engendered little controversy. Viewed as an innocuous and toothless policy statement, MEPA was unanimously embraced by Governor Anderson and by mining, logging, agriculture and

Historical Review of MEPA

Legislative History (continued)

other industrial interests. The environmental and conservation community endorsed MEPA as a first step to an enforceable environmental policy. In hindsight, it is almost as if the Protection Act unintentionally operated as a wedge or icebreaker, absorbing most of the political heat with MEPA casually trailing behind in its wake.

The votes both in committee and on the floor mirrored the political realities each bill had endured. The Protection Act received an adverse committee report with a 6-5 do not pass vote. When brought up on second reading in the house, the Protection Act was killed by a 49-48 vote.

The Protection Act, had it become law, would have enforced MEPA's purpose to "encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." The void left by the Protection Act's absence leaves questions to this day as to whether the legislature intended state agencies to substantively enforce MEPA's purpose and policies or only adhere to its procedural requirements.

In contrast to the Protection Act's much contested demise, MEPA sailed through third and final readings in both the House, 101-0, and the Senate, 51-1. The House accepted the Senate's amendments with a final vote of 99-0. MEPA's almost unanimous approval would, on its face, appear to have reflected a true consensus on the direction of the state's environmental policy.

However, at the end of the '71 regular session, MEPA's $250,000 appropriation was quashed--leaving Montana with an environmental policy but no means to implement it. Later, during a special legislative session in the summer of 1971, and after much debate, MEPA's appropriation was restored at a lower level-- $100,000. The battle over MEPA's funding is likely a better barometer of the political climate surrounding its enactment than the votes on the House and Senate floors. As the major sponsor of MEPA recently noted, a lofty policy without money to implement it is merely a nice bunch of words that have little effect.

Since MEPA's enactment, successive legislatures have struggled to achieve a consensus regarding the role of MEPA in directing state environmental policy. Proposed legislation ranging from limiting the scope and practical effectiveness of MEPA, to expanding its breadth and influence, was frequently introduced and subsequently killed. Except for some minor amendments in 1975, 1977, 1979, 1987, and 1989, the Montana Environmental Policy Act of today is identical to the 1971 version. The past 21 years of legislative activity scrutinizing MEPA reveals little consensus except that the state's articulated environmental policy of 1971 still holds true for 1994.

SECTION II - MEPA Handbook

Historical Review of MEPA

Court Interpretations

Since MEPA was first enacted, the Montana State Supreme Court has reviewed the Act and its implementation only four times. This limited judicial record leaves many interpretive questions unanswered. The Supreme Court has said that federal case law interpreting the National Environmental Policy Act is an appropriate guide in interpreting MEPA.

The District Courts have been somewhat more active in interpreting MEPA generating roughly 12 opinions. These opinions are unpublished which limits their precedent value. The Attorney General's Office has issued two opinions.

This subsection briefly analyzes the opinions of the Supreme Court. Copies of these opinions and detailed briefs are located in Appendix F. **Do not rely on this section for legal authority--refer to the official opinions.**

SUPREME COURT OPINIONS:

In its first case, *Montana Wilderness Association v. Board of Health and Environmental Sciences (1976)*, the Court looked at whether MEPA required or authorized the state to incorporate the broad environmental considerations discussed in MEPA when it decides to grant, deny, or condition the issuance of a permit or license. That case concerned the removal of sanitary restrictions on the proposed Beaver Creek South Subdivision in Gallatin County. The jurisdiction of the department arose under the Sanitation in Subdivisions Act, which requires DHES to review proposed subdivision provisions for water supply, sewage disposal and solid waste disposal. The department prepared an environmental impact statement triggered by the proposed action of removing these sanitary restrictions. Thirty days after the issuance of the final environmental impact statement, the department issued a certificate removing the sanitary restrictions on the plat. Just prior to this, the Montana Wilderness Association sought to enjoin the department in district court, alleging that the department's environmental impact statement was inadequate and, as such, the department had failed to comply with MEPA. The district court compared the EIS with the requirements set out in MEPA and found that the procedure adopted by the department had been wholly inadequate to meet the standards established in the statute.

The Montana Supreme Court heard the case on appeal and on July 22, 1976, it affirmed the district court's decision. The court held that the department was indeed required by MEPA to conduct a comprehensive review of the environmental consequences of its decision, and that the EIS prepared was procedurally inadequate due to an insufficient discussion and consideration of the full range of environmental factors required by MEPA. On December 30, 1976, however, the court issued a second opinion following a rehearing, and completely reversed its earlier decision.

Historical Review of MEPA

Court Interpretations Continued

In the December opinion, the court held that the Sanitation in Subdivisions Act dictates that the department act only in accordance with those criteria specifically expressed in that act: sewage, solid waste and water supply. The court reasoned that MEPA could not expand the department's review of subdivisions beyond those specific criteria, since that would create a conflict with legislative policy of local control as expressed in the Subdivision and Platting Act.

It remains unclear whether the holding of this case will be limited to those instances where a state versus local control question exists.

Three years later, in *Kaddillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979)* the Court was asked to decide whether the Montana Environmental Policy Act requires an agency to prepare an EIS on issuance of a permit if the time frames within which the permit decision must be made preclude preparation and issuance of an EIS. Following clear federal precedent, the Court held that because this situation constituted an irreconcilable conflict between MEPA and the Hard Rock Mining Act, an EIS would not be required. The Court noted that where there is a clear and unavoidable conflict in statutory authority exists MEPA must give way.

The Court next tackled the issue of what constitutes adequate alternatives in *Montana Wilderness Association v. Board of Natural Resources and Conservation, 200 Mont. 11, 648 P.2d 734 (1982).* In that case, the Montana Power Company (MPC) filed an application for certificate of environmental capatibility and public need pursuant to the Utility Siting Act (75-20-216), seeking permission to construct and operate an electrical transmission line from Bozeman to Ennis to Dillon including a spur from Ennis to Big Sky. The Board of Natural Resources and Conservation (BNRC) authorized MPC to construct the line. The Montana Wilderness Association and the Environmental Information Center (MEIC) appealed BNRC's decision to the District Court of Lewis and Clark County. The District Court affirmed the Board's decision.

Among other issues, MEIC argued that the draft and final environmental impact statements were inadequate as a matter of law for failing to consider the need for and alternatives to the transmission facilities in the Upper Madison/Lower Ruby valleys and at Big Sky; and for failing to consider the "no action" alternative.

The Court, referring to federal case law, noted that while there was no separate section in the EISs devoted to the consideration of the need for and alternatives to the proposed electrical transmission lines serving the Upper Madison and Lower Ruby valley area, there is enough basic information in the documents (i.e., statistics on needs, exiting transmission line data, and projections for additional demand) for BNRC to reach an informed decision. The Court went on to say that the primary function of the EIS is to provide the decision-maker with environmental

Historical Review of MEPA

Court Interpretations Continued

reports sufficiently detailed to allow a knowledgeable judgement and to allow public feedback in the development of that information. The Court could not say that the Board's decision was arbitrary, capricious or clearly erroneous in view of the EISs and documents that it had before it.

In its most recent case, the Supreme Court in *North Fork Preservation Association v. Department of State Lands, 778 P.2d 862 (1989)*, was asked to review the Department of State Land's (DSL) decision not to write an environmental impact statement (EIS) on an exploratory oil well. The Department had approved an oil and gas lessees' operating plan which called for drilling an exploratory well on a leased tract of state school trust land. The central issue before the court was at what stage in the oil and gas lease process is an EIS on development legally required? The court held that the district court incorrectly concluded that full field development of oil and gas was but a number of successive steps set into irreversible motion by the issuance of a lease thus requiring the preparation of an EIS. The Supreme Court noted that overall impacts of full-field development are not at issue. The proposed project/action under consideration is the drilling of one exploratory well on one lease tract.

The Court noted that an EIS is required at the point of permitting oil and gas development only at the "go/no go" state of oil and gas development. If the proposed action entails an irretrievable commitment of resources then an EIS is required. Here, the lessee cannot carry out any activities which would disturb the ground in anyway without prior written approval of the Department. The issuance of this lease therefore, was not an irretrievable commitment of resources--no EIS was required.

Historical Review of MEPA

Review of Agency MEPA Implementation

Although the Act has not changed, agency implementation of MEPA has been a dynamic process. Changes in MEPA procedures have been instituted to meet agency needs, to accommodate direction from changing administrations, and to answer the concerns of the public and of project sponsors.

Since MEPA's enactment, the executive branch has reviewed and revised its MEPA Rules three times-- in 1976, 1980, and 1988. The Environmental Quality Council (EQC) has received thousands of environmental review documents from state agencies since 1972* (see figure 3). In MEPA's first year of existence, 64 environmental impact statements (EIS) were produced. By 1973, state agencies reached the apex of EIS production--issuing 126 of the documents. The volume of documents produced in these early years represents an attempt at good faith compliance by most agencies.

As of September 1992, state agencies have produced roughly 349 EISs. The trend over time has been to produce fewer EISs and more environmental assessments (EA) (formerly known as a "preliminary environmental review or PER"). This downward trend in EIS production cannot be attributed to any one factor. The conditioning of permits to mitigate adverse impacts, allocation of costs between the agency and applicant, political concerns, more

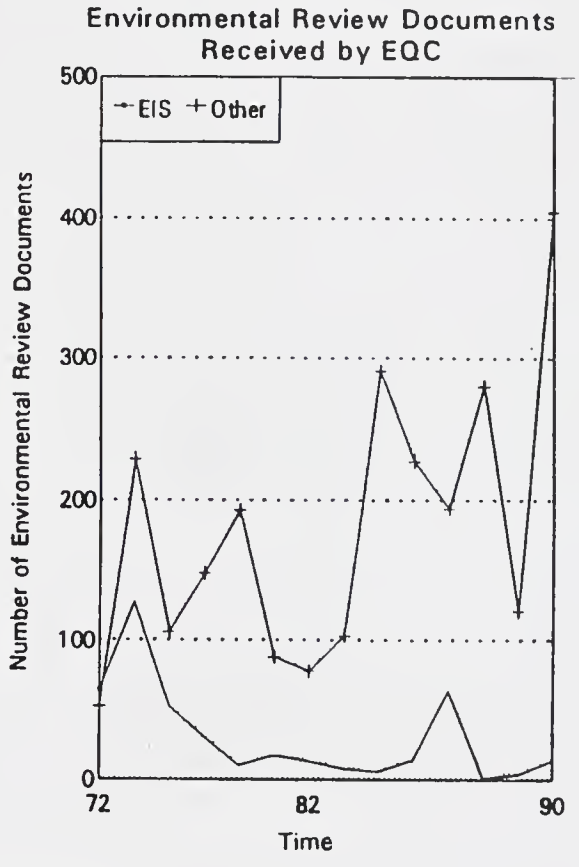


Figure 3.

*The EQC staff is still in the process of entering roughly 3,500 MEPA documents received from state agencies since 1972 onto a computer data base. Note that this figure is only a record of those documents the EQC has received; the number of documents state agencies may have actually produced is probably larger. Although state agencies are required by MEPA to submit all environmental review documents to the EQC, this practice is not always followed. The term "environmental review documents" includes EISs (final and draft), EAs (draft and final), Mitigated EAs, PERs, AIDs, and Records of Decision.

Historical Review of MEPA

Review of Agency MEPA Implementation (continued)

comprehensive requirements for EISs, and the subjective nature of the criteria for determining whether an adverse impact is "significant" all have contributed to agency decisions to prepare EAs rather than EISs.

Although figure 3 provides a general understanding of how agencies over time have implemented the types and numbers of environmental review documents have changed over time, it reveals nothing about how agency personnel have historically utilized those documents in the agency decision-making process. Has MEPA actually contributed to making better decisions or has it been treated as a proforma exercise. One of the major motivations behind the promulgation of the current MEPA Rules by the executive branch in 1988 was to make environmental review documents more useful to decision-makers and the public.

After fours years of implementation it is time to assess whether the current MEPA Rules have indeed encouraged informed and hopefully better decisions. During the training seminars, EQC staff will be informally soliciting your experiences with MEPA and the agency decision-making process.

Upon completion of the MEPA training process for executive branch agencies subject to MEPA's statutory mandates, the EQC will facilitate a series of intensive discussion sessions with agency personnel and interested organizations and citizens to explore whether the MEPA Rules accurately and fully describe how the environmental review process is currently administered.

SECTION II - MEPA Handbook

Purpose and Meaning of MEPA

Introduction

The "Purpose and Meaning of MEPA" subsection is designed to expose you to the language of the statute and increase your understanding of the reasoning behind MEPA's requirements. Training objectives include: (1) reviewing and discussing the organization of MEPA; (2) examining MEPA's statutory language; (3) distilling MEPA's twin objectives; and (4) discussing the fully informed decision-maker concept. Throughout this subsection, instructors will be referring to the MEPA statute which is located in Appendix A, page A-1.

Statute Organization

Intentionally patterned after the National Environmental Policy Act enacted in 1969, MEPA includes three distinct parts (see figure 4). Part 1 is the policy or "spirit" of MEPA. Specifically, Part 1 establishes a policy for "a productive and enjoyable harmony between man and his environment" and requires state government to coordinate state plans, functions, and resources to achieve various environmental, economic, and social goals. It also establishes that each person is entitled to a healthful environment and has a responsibility to enhance and preserve the environment. Part 1 has no legal requirements but the policy and purpose provide guidance in interpreting the statute.

Part 2 contains the requirements of MEPA, or stated another way, the "letter" of the law. Part 2 is the nuts and bolts of the Act. It requires state agencies to carry out the policies in Part 1 through the use of a systematic, interdisciplinary analysis of state actions that have an impact on the human environment.

Part 3 of the Act establishes the Environmental Quality Council and outlines its authority and responsibilities.

The Act itself is not an intimidating piece of legislation. Discounting Part 3, MEPA is only six and one-half pages in length. The Act has a very readable format. If you haven't done so already, take 15 minutes at work and read it. That 15 minute reprieve from the daily grind will be invaluable in explaining the philosophy, reasoning, and justification behind the legal constraints that MEPA dictates.

Statutory Language Review

Reviewing MEPA's statutory language is useful in dispelling incorrect perceptions about what the Act intends and requires (see Figure 5). MEPA is <u>not</u> a statute controlling or setting regulations for any specific land or resource use. It is <u>not</u> a preservation, wilderness, or anti-development Act. It is <u>not</u> a device for throttling industrial or agricultural development. If implemented correctly and efficiently, MEPA should encourage and foster economic development that is environmentally and socially sound.

MEPA STATUTORY ORGANIZATION

PART 1: Purpose and Policy

Establishes a policy for "a productive and enjoyable harmony between man and his environment" and requires state government to coordinate state plans, functions, and resources to achieve various environmental, economic, and social goals; it further notes that each person is entitled to a healthful environment and has a responsibility to enhance and preserve the environment.

PART 2: Environmental Review Requirements

Sets out requirements for state agencies to carry out the above policies through the use of a systematic, interdisciplinary analysis for those state actions that have an impact on the human environment.

PART 3: Creation of the EQC

Establishes a legislative agency--the Environmental Quality Council and outlines its authority and responsibilities.

Figure 4

MEPA MISCONCEPTIONS AND REALITIES

WHAT MEPA IS NOT:

* Preservation
* Wilderness
* Anti-Development
* Regulatory

WHAT MEPA IS:

* Balance Between People and Their Environment
* Custodial and Trustee Responsibilities
* Utilitarian

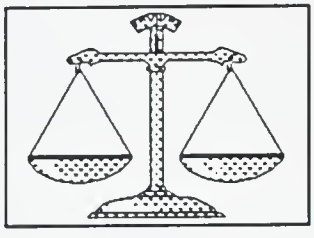
Figure 5

SECTION II - MEPA Handbook

Purpose and Meaning of MEPA

Statutory Language Review (continued)

MEPA does suggest that there be a balance between people and their environment, between population and resource use, and between short term use and long term productivity.



MEPA further acknowledges that each generation of Montanans has a custodial responsibility concerning the use of the environment. It notes that Montanans are trustees of the environment for future generations. MEPA suggests a utilitarian philosophy. Utilitarian terms such as "human environment," "productive", "beneficial uses," "high standards of living" and "life's amenities" were intentionally inserted in the purpose and policy of the Act. MEPA truly is a "balancing act" Act.

MEPA's Twin Objectives

MEPA has two central requirements:

(1) consider the environmental and human impacts of the agency's proposed action; and

(2) insure that the public is informed of, and participates in the decision-making process.

(see figure 6).

MEPA's first objective requires the agency to conduct an honest, unbiased, scientifically-based full disclosure of all relevant facts concerning impacts on the human environment. This is accomplished through a systematic interdisciplinary approach that insures the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking. Such an interdisciplinary approach is mandated by MEPA.

MEPA's second objective-- public participation-- compels state agencies to involve the public through each step of the decision-making process. This is accomplished by:

(1) telling the public what the proposed action is up front (purpose and need):

(2) seeking comments on the proposed action (scoping);

(3) writing a statement (EA or EIS) that documents and discloses the impacts of the proposed action and considers reasonable alternatives and mitigation measures; and

(4) informing the public of what the agency's decision is and the justification for that decision.

The underlying premise of the public participation requirement is government accountability. MEPA requires state government to be accountable to the people of Montana when it makes decisions that impact the human environment.

MEPA's TWIN OBJECTIVES

* **Consider the Environmental and Human Impacts of the Agency's Proposed Action; and**

* **Insure that the Public is Informed of and Participates in the Decision-Making Process.**

Figure 6

SECTION II - MEPA Handbook

Purpose and Meaning of MEPA

The Fully Informed Decision-Maker

One of the broader implied goals of MEPA is to foster better decisions and wise action by ensuring that relevant environmental information is available to public officials before decisions are made and before actions are taken. Take for example a solid waste permit. What factors enter into a decision to permit a landfill and how does the MEPA process relate to these factors? Note that Figure 7 below illustrates that environmental considerations are just one element of the "decision bubble". Legal constraints, economic considerations, political concerns, technical factors, etc. are all competing concerns that influence decisions. MEPA doesn't require that the decision be made on the basis of the environmental bubble alone. Under MEPA, if you can withstand the political heat, abuse of the environment can take place as long as you know what damage will occur and provide the public the opportunity to participate in the process.

MEPA provides a process--another tool in the daily vocational tool box that can help ensure that permitting and other actions that impact the human environment are informed decisions. Informed in the sense that:

* reasonable alternatives are evaluated;

* the consequences of the decision are understood; and

* the public's concerns are known.

As MEPA's chief sponsor, former Representative George Darrow recently noted, the fundamental premise of MEPA is "common sense." MEPA, in his words "is a think before you act--Act." State agencies are required to think through their actions before acting.

DECISION BUBBLE

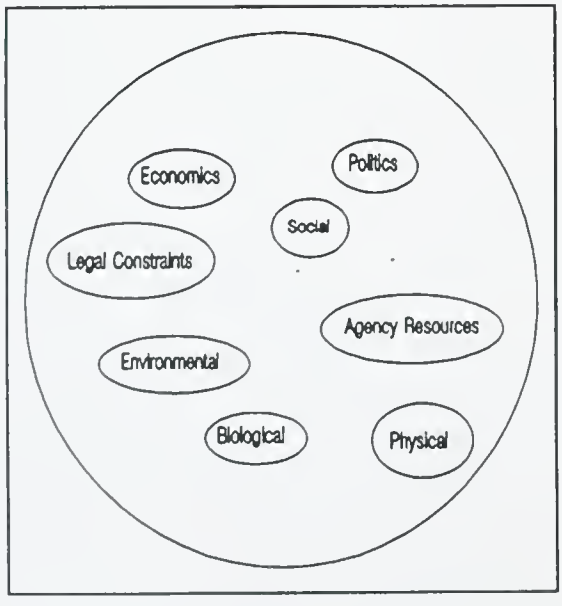


Figure 7.

Nexus Between MEPA and Other Agency Statutory Mandates

Introduction

The aim of this subsection is to illustrate MEPA's role as it relates to other agency statutory mandates. Training objectives include: (1) examining MEPA's broad coordination and interface requirements; and (2) visualizing how MEPA can be incorporated within other agency statutory mandates.

MEPA's Umbrella Requirements

Language in MEPA makes it clear that the law was meant to change the way in which agencies approached their duties under other statutes. First, the legislature directed that all policies, regulations, and laws of the state are to be interpreted and administered in accordance with the policies of MEPA. Secondly, agencies are to develop methods and procedures for giving appropriate consideration to "presently unquantified environmental amenities and values" which previously had not been weighed, along with economic and technical factors. Finally, MEPA states explicitly that policies and goals of MEPA are supplementary to those set forth in the existing authorizations of all state agencies.

All of these directives are to be pursued "to the fullest extent possible," and agencies are directed "to use all practicable means, consistent with other essential considerations of state policy," in achieving the goals of MEPA. Given these sweeping mandates, it is as if the policy statements and goals of MEPA have been incorporated into the policy of every other state statute. Only where MEPA is in direct and unavoidable conflict with another statute may environmental concerns play a subordinate role in agency considerations, and such exceptions must be narrowly construed. The language "to the fullest extent possible" creates a presumption that MEPA applies, and an agency should bear the burden of proving that it does not.

The challenge, of course, is to incorporate and implement MEPA's broad policies within the context of each agency's statutory mandates. Most agencies have taken a significant step in that direction by adopting MEPA Model Rules. These rules reiterate MEPA's umbrella requirements, noting that in order to "fulfill the stated policy of that act [MEPA], the agency shall conform to the following rules prior to reaching a final decision on proposed actions covered by MEPA" (MEPA Model Rule I). The MEPA Rules further clarify how an agency must proceed when statutory conflicts arise.

MEPA Model Rule XXI notes that if there is a conflict between the MEPA Rules and another provision of state law that prevents the agency from fully complying with MEPA and the MEPA Model Rules, the agency must: (1) notify the governor and the EQC of the nature of the conflict; and (2) "suggest a proposed course of action that will enable the agency to comply to the fullest extent possible with

Nexus Between MEPA and Other Agency Statutory Mandates

MEPA's Umbrella Requirements (continued)

the provisions of MEPA." MEPA Model Rule XXI further notes that it is the responsibility of the agency to continually "review its programs and activities to evaluate known or anticipated conflicts between the MEPA Rules and other statutory or regulatory requirements." Each agency must "make such adjustments or recommendations as may be required to ensure maximum compliance with MEPA and these rules" (MEPA Model Rule XII (2), emphasis added).

Obviously, the onus is on state agencies to evaluate their own statutory mandates and come up with a plan to achieve maximum compliance with MEPA. The MEPA Model Rules provide the necessary flexibility for an agency to effectuate its own blend of "maximum compliance."

THE MEPA UMBRELLA

Figure 8

Environmental Review Process

SECTION III
General Framework for Environmental Review

* MEPA as a Problem Solving Tool

* Environmental Review Framework

SECTION III - MEPA Handbook

MEPA as a Problem Solving Tool

Introduction

This subsection will illustrate that MEPA is a problem solving tool with universal application. Training objectives include: (1) applying the MEPA process to a typical problem; (2) understanding MEPA's interdisciplinary approach requirement; and (3) understanding the role of the decision-maker.

Problem Solving

MEPA embodies the basic tenant of problem solving: "think before you act." MEPA requires up-front analysis before an action is taken to identify potential problems and issues that may arise. Typically, a problem or need has been identified. The agency responds by proposing to take an action or series of actions that would solve the problem or meet the need. MEPA requires agencies to generate and organize information that:

(1) discloses the perceived need (or problem);
(2) explains the agencies proposed response (or solution) to the need (or problem);
(3) discusses alternative responses (or solutions) to the need (or problem);
(4) analyzes the potential consequences (impacts) of pursuing one alternative or another in response to the need (or problem); and
(5) discusses specific procedures for alleviating or minimizing adverse consequences (impacts) associated with the proposed response (or solution).

Ideally, once the information is generated and reviewed, a decision is made as to which solution or response is appropriate.

As noted earlier, the agency's decision might not be based solely on the impacts revealed through the environmental review process. Other factors including political, technical, economic, and social influences may drive the decision. MEPA requires only that the agency disclose the potential consequences of its actions.

It is helpful in visualizing MEPA's broad problem solving approach by analyzing a situation that is outside conventional MEPA application. Take the infamous hypothetical of "why did the chicken cross the road."

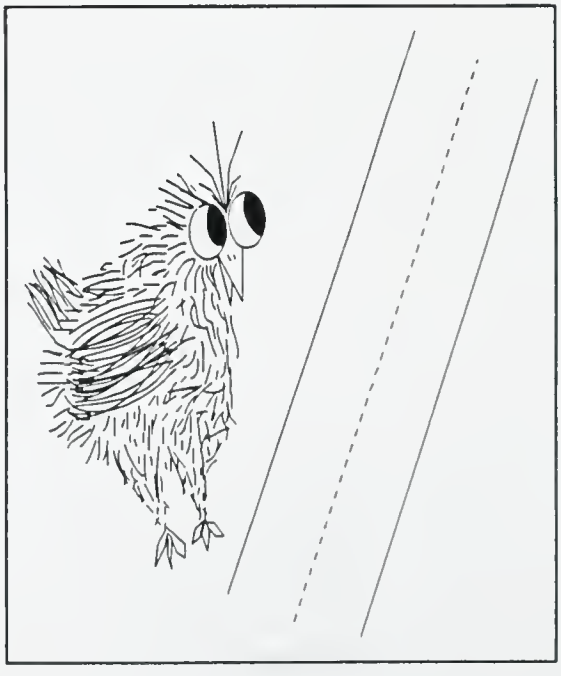


Figure 9.

MEPA as a Problem Solving Tool

Problem Solving (continued)

Before the chicken can cross the road, MEPA requires the chicken to contemplate its action.

First, MEPA requires the chicken to identify the perceived problem (the chicken must get to the other side of the road). MEPA requires the chicken to explain why it must cross the road, disclosing the purpose and need of its action. Maybe the chicken wants to cross the road "to get to the other side" or because the road is there or possibly because it is in need of the restroom that happens to be on the other side of the road. Whatever the reason, MEPA requires the chicken to disclose and document it.

Second, under MEPA, the chicken must describe its proposed response or solution (i.e., walking) to the perceived need or problem of crossing the road.

Third, MEPA requires the chicken to think about reasonable alternatives to its proposed action of walking across the road. It could crawl or run across the road. It could fly over it or even dig a tunnel under it. MEPA even requires the chicken to contemplate doing nothing at all--not crossing the road.

Fourth, MEPA requires that the chicken contemplate its possible fate when and if it decides to cross the road by requiring the chicken to think about the potential consequences (impacts) of pursing one alternative or another. Crawling may be more dangerous than walking, running or flying, or digging a tunnel. Digging a tunnel may take longer and be more expensive than walking, flying, or crawling. Flying may be unrealistic because the chicken has clipped wings. Not doing anything may be the safest of all possible alternatives. MEPA requires this type of trade-off analysis.

Fifth, the chicken must think about minimizing potential adverse impacts associated with its proposed action of walking across the road. The chicken might think about wearing a crash helmet to protect its head or possibly an armored body suit. Whatever the case, MEPA requires the chicken to analyze potential mitigation measures.

Finally, once the chicken has thoughtfully considered the impacts of its action and publicly disclosed that thought process it may make its decision on whether or how to cross the road.

This absurd example exemplifies that the basic elements of MEPA are in fact some of the common sense practical considerations that are taken for granted and usually never verbalized when each of us is faced with our own mundane or not so mundane problems. The only difference is that MEPA, by law, requires the agency to verbalize and document its thought process.

MEPA's Interdisciplinary Approach

One of the fundamental tenants of MEPA is that when confronted with a problem or need that requires some action that impacts the human environment, agencies are required to utilize a "systematic interdisciplinary approach" to insure that multiple

MEPA PROBLEM SOLVING

HYPOTHETICAL: Why did the Chicken Cross the Road?

PURPOSE & NEED: To Get to the Other Side

PROPOSED ACTION: Walk Across the Road

ALTERNATIVES:

* Run
* Fly
* Dig a Tunnel
* Do Nothing at all

CONSEQUENCES OF THE PROPOSED AND ALTERNATIVES:

* Proposed Action-- Walk
  consequences: too slow, potential for being hit by a car, etc.
* Run
  consequences: possible chicken heart problems, potential for being hit by car.
* Fly
  consequences: flying hazards, less of a potential for being hit by a car.
* Dig Tunnel
  consequences: no potential for being hit by a car, cost may be high, etc.
* Do Nothing:
  consequences: no cost, safe, chicken does not get to the other side of the road.

MITIGATION MEASURES: Cross Walk, Bridge, Crash Helmet, Full Armored Body Suit

RECOMMENDATIONS: Run Across the Road Instead of Walk

Figure 10

MEPA as a Problem Solving Tool

MEPA's Interdisciplinary Approach (continued)

perspectives and disciplines from the natural and social sciences as well as the environmental design arts are incorporated in the agency's analysis. Simply put-- a collection of one, two, three, four or more multi-disciplinary minds analyzing an action is better than one or two or more entrenched, narrowly focused minds.

The intent behind this requirement is to ensure that experts trained in specific facets of the affected human environment (i.e., wildlife biologist, economist, hydrologist, archaeologist, soil scientist, sociologist, etc.) are all involved in the analysis.

Because MEPA requires that agencies incorporate broad environmental and human concerns into their decision-making process, agencies must assimilate or have at their disposal the necessary interdisciplinary expertise to adequately address those concerns. If the necessary expertise cannot be found within the agency, it must investigate other resources (i.e., other agencies, universities, consultants, etc.).

For simple actions with little or no impact, one person, as opposed to an interdisciplinary team, may be able to adequately incorporate MEPA's interdisciplinary requirements. As the complexity and significance of the impacts increase, so too must an agency's application of interdisciplinary resources increase. Ultimately, like most MEPA requirements, an agency must make a subjective determination as to what level of interdisciplinary effort is appropriate under the circumstances.

Role of the Decision-Maker

The deciding officer, the person whose responsibility it is to approve the environmental review document and to decide whether to undertake the proposed action (e.g., grant permit, construct facility), plays a critical role in the MEPA process.

The deciding officer must be someone different than the person(s) writing the environmental review document -- someone who has the authority to make decisions on behalf of the agency. While the individual who fills the role of decisionmaker may vary from agency to agency, or even between programs within the same agency, typically the decisionmaker is a program manager, section head, bureau chief, administrator or, in some cases, even an agency director.

As the project leader for an environmental review, it is your responsibility to identify and communicate to the decisionmaker important issues that require a decision as they arise throughout the environmental review process. You should start by meeting with the decisionmaker early on in the process to clearly define the decisions that the decisionmaker must make, and to decide upon the:

(1) appropriate level of MEPA review;

(2) proposed action and its benefits;

(3) appropriate scope and depth of analysis and documentation; and,

(4) appropriate level of public

MEPA as a Problem Solving Tool

Role of the Decision-Maker (continued)

participation.

The decisionmaker, in turn, has the responsibility to make himself/herself readily available to the project leader, and to make clear and timely decisions on the issues listed above. By working together to fulfill their respective roles, the project leader and decisionmaker can achieve MEPA's goal of ensuring fully informed decisions.

MEPA's INTERDISCIPLINARY APPROACH

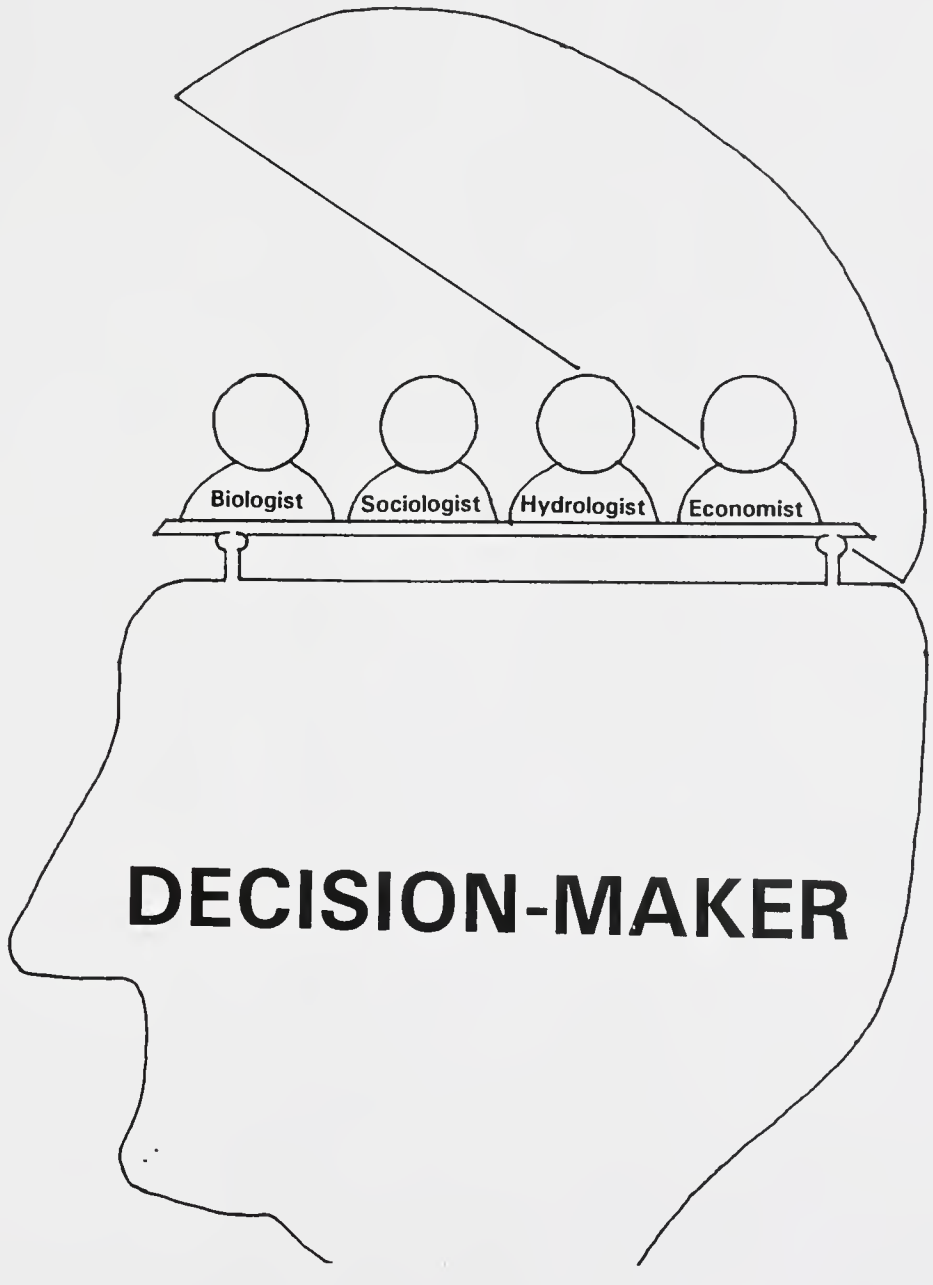


Figure 11

SECTION III - MEPA Handbook

Environmental Review Framework

Introduction

This subsection will briefly illustrate MEPA's logical framework for environmental review. Each general issue will be further refined later in the training seminar. The training objective for this subsection is learning the general environmental review framework.

Environmental Review Framework

MEPA and the MEPA Model Rules provide a logical framework in which to understand and evaluate the MEPA process. Every time you think you might be taking an action that potentially could trigger the MEPA review process there are five questions you should ask yourself:

* When is Environmental Review Required (or phrased differently-- when is MEPA triggered)?

* What Form will the Environmental Review Take? (EA, EIS, or something else?)

* How will I Accomplish this Environmental Review (or how do I go about writing an environmental review)? and

* What Level of Public Involvement is required and/or Appropriate in the Environmental Review Process? and

* How can the Environmental Review Document be Utilized in Decision-making?

If you review these questions every time a potential MEPA issue arises, you will have a solid foundation from which to start the MEPA process.

GENERAL FRAMEWORK FOR ENVIRONMENTAL REVIEW

* When is Environmental Review Required?

* What Form will the Environmental Review Take? (EA, EIS, or some other form of interdisciplinary review)?

* How will I Accomplish this Environmental Review (or how do I go about writing an environmental review)?

* What level of Public Involvement is Required and/or Appropriate in the Environmental Review Process? and

* How can the environmental review document be utilized in decision-making?

Figure 12

SECTION IV
When is Environmental Review Required?

* What is an "Action"?

* Is this an "Action" that is not Subject to MEPA Review?

* Does this Action have an Impact on the Human Environment?

What is an "Action" as Defined by MEPA?

Introduction

There is a series of questions that should be contemplated each time an agency takes an "action." These questions are:

(1) Is this an "action" as defined by MEPA and the MEPA Model Rules?

(2) If it is, is the action exempt or excluded from MEPA review?

(3) If the action is not exempt or excluded, does the action impact the human environment?

While there is no magic answer, this logical framework should be of considerable help in making a determination as to whether MEPA applies. This subsection will analyze question #1 above. Training objectives include: learning the definition of the term "action" and discussing its application to your particular agency.

"Action"

The term "action" is defined as:

* a project, program or activity directly undertaken by the agency;

* a project or activity supported through contract, grant, subsidy, loan or other form of funding assistance from the agency, either singly or in combination with one or more other state agencies; or

* a project or activity involving the issuance of a lease, permit, license, certificate or other entitlement for use or permission to act by the agency, either singly or in combination with other state agencies.

(MEPA Model Rule II (1)) (see Figure 13).

If the project, program or activity falls within the definition of the term "action" then it is potentially subject to MEPA review.

DEFINITION OF THE TERM "ACTION'

"Action" means:

* a project program or activity directly undertaken by the agency;

  Examples:
  * *wildlife enhancement projects*
  * *land acquisition*
  * *state timber sales*
  * *rule-making activities*

* a project or activity supported through a contract, grant, subsidy, loan or other form of funding assistance from the agency either singly or in combination with one or more other State agencies; or

  Examples:
  * *contract*
  * *grant*
  * *subsidy*
  * *loan*

* a project or activity involving the issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency, either singly or in combination with other state agencies.

  Examples:
  * grazing lease
  * cloud seeding permit
  * roadside zoo permit

Cite: MEPA Model Rule II (1)

Figure 13

SECTION IV - MEPA Handbook

Is this an Action not Subject to MEPA Review?

Introduction

The term "action" as defined by the MEPA Model Rules is very broad. Almost any activity an agency takes fits under this expansive definition and would thus trigger the MEPA review process. This subsection analyzes those situations where certain types of actions are exempt and excluded from MEPA review (note figure 14). Training objectives for this subsection include: identifying those types of actions within your agency that are potentially not subject to MEPA review.

Excluded Actions

There is a category of actions that seldom or never involve impacts that individually, collectively or cumulatively require an EA or an EIS-- although under certain situations could conceivably have such impacts. The MEPA Model Rules recognize that this type of action could be excluded from site-specific environmental review and the need to prepare either an EA or an EIS. State agencies are provided with the option of defining through rule-making or justifying by programmatic environmental review the types of actions that would be categorically excluded and the reasons or circumstances that warrant that exclusion. Agencies are also required to identify the circumstances that could cause an otherwise excluded action to potentially have significant environmental impacts and to provide a procedure whereby these situations would be discovered and appropriately analyzed.

Exempt Actions

There is a category of actions that do not require any review under MEPA because of their special nature. Those actions include:

* administrative actions (routine clerical or similar functions, including but not limited to administrative procurement, contracts for consulting services or personnel actions);

* minor repairs, operations, maintenance of existing facilities;

* investigation, enforcement, data collection activities;

* ministerial actions (actions in which the agency exercises no discretion but rather acts upon a given state of facts in a prescribed manner); and

* actions that are primarily social or economic in nature and that do not otherwise affect the human environment.

If the proposed agency action fits under any of the above categories then it is exempt from environmental review. Otherwise the action is subject to MEPA review if it impacts the human environment.

SIX SITUATIONS WHERE NO ENVIRONMENTAL REVIEW IS REQUIRED

* actions that qualify for a categorical exclusion

* administrative actions

* minor repairs, operations, maintenance of existing facilities

* investigation, enforcement, data collection activities etc.

* ministerial actions

* actions that are primarily social or economic in nature and that do not otherwise affect the human environment

Cite: MEPA Model Rule III (5).

Figure 14

SECTION IV - MEPA Handbook

Does this Action have an Impact on the Human Environment?

Introduction

If the agency's activity falls within the definition of "action" under the MEPA Model Rules, and if that action is neither categorically excluded nor exempt from MEPA review, then some form of environmental review is required if there is a potential impact from the proposed action on the human environment. This sub-section analyzes the type of impact necessary to trigger MEPA review. Training objectives include identifying both adverse and beneficial impacts that could trigger the MEPA review process.

Impacts that Trigger MEPA

MEPA requires agencies to conduct a systematic and interdisciplinary environmental review for planning and decision-making which may impact the human environment. The "human environment" encompasses the biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment (MEPA Model Rule II (12)) (See Figure 15). According to the MEPA Model Rules, "an impact may be adverse, beneficial, or both" (MEPA Model Rule IV (2)). Therefore if the proposed action potentially impacts the human environment in anyway--either beneficially or adversely, the agency must conduct some form of environmental review.

The degree and/or intensity of the impact is irrelevant in determining whether an environmental review must be conducted--only the fact that there is potentially some impact to the human environment is pertinent to triggering environmental review. The degree and intensity of impacts determine the type of environmental review that should be conducted. This will be discussed in Section IV.

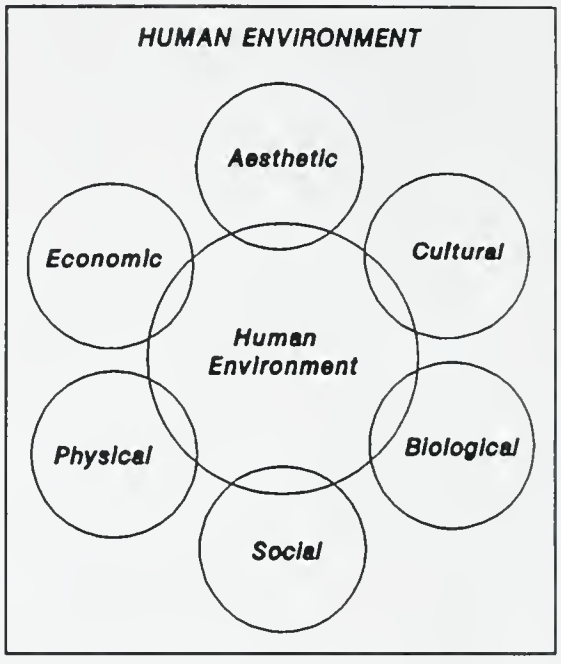


Figure 15.

Once it has been determined that the proposed action will potentially impact the human environment, the agency must conduct some form of environmental review before it makes a decision to proceed with the action. The only exception to this rule is if an agency's action constitutes an "emergency" (see MEPA Model Rules II (8) & Rule XIX).

Does this Action have an Impact on the Human Environment?

Impacts that Trigger MEPA (continued)

Emergency actions generally include those actions necessary to:

(1) repair or restore property or facilities damaged or destroyed as a result of a disaster;

(2) repair public service facilities necessary to maintain service; or

(3) construct projects to prevent or mitigate immediate threats to public health, safety, welfare, or the environment. (MEPA Model Rule II (8)).

Within 30 days following initiation of the action, an agency must notify both the governor and the EQC as to the need for the action and the resulting impacts (MEPA Model Rule XIX). Note that emergency actions must be limited to those actions immediately necessary to control the impacts of the emergency.

Note then, that even if the action constitutes an emergency the agency must, within 30 days, conduct some level of environmental analysis to determine the "resulting" impacts. Emergency actions only postpone the environmental review process (rather than exempt the action from environmental review) until after an action is taken.

In summary, if the proposed action taken by an agency could impact the human environment and that action is neither categorically excluded or exempted from MEPA review then some form of environmental review must take place before an agency makes a decision unless the action is an emergency. If it is an emergency action then some form of environmental review is required within 30 days after the agency initiated the action.

SECTION V
What Form Will the Environmental Review Take?

* Determination of the Appropriate Level of MEPA Documentation

SECTION V - MEPA Handbook

What Level of Environmental Documentation is Appropriate?

Introduction

This subsection illustrates the thought process for deciding upon the appropriate level of MEPA documentation for any state action. Training objectives include: (1) determining what circumstances require an agency to write an EIS as opposed to a generic EA or mitigated EA, and (2) being able to differentiate between the three major document types.

Appropriate Documentation

There is no magic formula for determining the appropriate level of environmental review. This does not mean that it is impossible to make certain generalizations or to categorize various classes of state actions according to the level of review that would typically be appropriate.

There are two key factors that most heavily influence the decision as to what form of environmental review is necessary, and it is virtually impossible to apply them except on a cases by case basis. First, the agency must appraise the scope/magnitude of the project, program, or action contemplated. Second, the characteristics of the location where the activity would occur must be assessed. The agency must consider both of these factors together in determining the relative significance of impacts that the proposed action has on the human environment. The MEPA Model Rules further clarify these two factors-- detailing specific significance criteria (note figure 16).

Where a proposed action is a major one significantly affecting the quality of the human environment the agency's statutory obligation is clear-- an EIS must be prepared.

However, the MEPA Model Rules note two exceptions to this general rule. First, if the proposed action has significant impacts but agency statutory requirements do not allow sufficient time for an agency to prepare an EIS, then an agency must prepare a generic EA. Second, in situations where the action is one that might normally require an EIS, but effects that might otherwise be deemed significant can be mitigated below the level of significance through enforceable design or control measures, the agency may (at its own discretion) prepare a "mitigated EA" (MEPA Model Rule III (4)).

An agency's discretion in choosing to prepare a mitigated EA as opposed to an EIS is limited. The agency will be allowed to prepare a mitigated EA only if it can demonstrate that:

(1) all impacts of the proposed action have been accurately identified;

(2) all impacts will be mitigated below the level of significance; and

(3) that no significant impact is likely to occur. (MEPA Model Rule III (4)).

If it is unclear whether the proposed action may generate

SIGNIFICANCE CRITERIA

* the severity, duration, geographic extent, and frequency of occurrence of the impact;

* the probability that the impact will occur if the proposed action occurs; or conversely, the reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;

* growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;

* the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;

* the importance to the state and to society of each environmental resource or value that would be affected;

* any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and

* potential conflict with local, state, or federal laws, requirements, or formal plans.

Cite: MEPA Model Rule IV.

Figure 16.

What Level of Environmental Documentation is Appropriate?

Appropriate Documentation (continued)

impacts that are significant, then an agency may prepare an EA in order to make a significance determination. (MEPA Model Rule III (3)). Again, if the EA determines that the proposed action will have significant impacts, then either an EIS must be prepared or the effects of the proposed action must be mitigated below the level of significance and documented in a mitigated EA.

If it is clear that the proposed action will not have a significant effect on the human environment (that no EIS is required) then an agency may prepare an EA or some other form of systematic and interdisciplinary analysis (MEPA Model Rule III (3)).

If an agency is contemplating a series of agency-initiated actions, programs, or policies which in part or in total may significantly impact the human environment, the agency must prepare a programmatic review that discusses the impacts of the series of actions (MEPA Model Rule XVII (1)). An agency may also prepare a programmatic review when required by statute, if the agency determines that such review is warranted, or whenever state/federal partnership requires programmatic review (MEPA Model Rule XVII (2). The determination as to whether the programmatic review takes the form of an EIS or an EA will be made in accordance with the significance criteria noted above (MEPA Model Rule XVII (3)).

Impact significance is the key to determining what form of environmental review is appropriate under the circumstances. Once that initial determination is made--MEPA and the MEPA Model Rules clearly delineate which document should be prepared.

SECTION VI
How is the Environmental Review Accomplished?

* Overview of the Steps in the Environmental Analysis Process

* Purpose and Need of the Proposed Action

* Affected Environment

* Alternatives

* Impact Analysis/Environmental Consequences

SECTION VI - MEPA Handbook

Overview of the Steps in the Environmental Analysis

Introduction

This subsection introduces the fundamental elements of the environmental analysis process. This subsection also introduces an example, the "Big Cutthroat Creek Dinosaur Dig." This example will be used throughout Section VI to illustrate significant components of the environmental review process.

Training objectives for this subsection include: (1) comparing EA and EIS requirements; (2) developing a generic topical outline and flow chart for the environmental analysis process; and (3) determining the appropriate depth and scope of analytic detail required in the environmental analysis process.

It is important to acknowledge that Section VI was developed using the following sources:

- *Shipley & Associates, Applying the NEPA Process;*
- *U.S. Forest Service, 1900-01 NEPA Training Manual;*
- *U.S. Forest Service, Region 1, "Our Approach to Effects Analysis";*
- *CEQ, NEPA Regulations, 40 CFR Parts 1500-1508;*
- *CEQ's Forty Most Asked Questions Concerning CEQ's NEPA Regulations; and*
- *Montana Department of State Lands, Forestry Division, "Applying MEPA to Forest Management Activities".*

Many of the ideas, terms, and figures included in Section VI were gleaned from the above sources.

MEPA Document Requirements

Regardless of whether you are preparing an EIS or an EA, MEPA and the MEPA Model Rules require common environmental review procedures. In fact, in terms of substantive requirements, the EA and EIS are almost identical (Note Figure 17). Both documents require:

- **a description of the proposed action;**
- **a description and analysis of reasonable alternatives;**
- **an evaluation of the impacts; and**
- **a listing and evaluation of appropriate mitigation measures.**

The only real substantive difference between an EA and an EIS lies in the scope and depth of analysis. Generally, the complexity and scope of significant impacts associated with EISs requires a more in-depth detailed analysis than would otherwise take place in EAs.

As a cautionary note, there are significant procedural differences between an EIS and an EA in terms of public review and agency response to public comment. These will be discussed in Section VII. For the purposes of this section, the skills that you will learn are applicable to all MEPA documents.

EA vs. EIS: A SUBSTANTIVE COMPARISON

Rule Requirements	EA	EIS
A description of the proposed action including the purpose and benefits?	Yes	Yes
A listing of entities with overlapping jurisdiction?	Yes	Yes
Description of current environmental conditions?	Yes*	Yes
Description and evaluation of the impacts (including primary, secondary, and cumulative) on the human environment?	Yes	Yes
Description and evaluation of growth-inducing or growth-inhibiting impacts?	Yes*	Yes
Description and evaluation of irreversible and irretrievable commitments of environmental resources?	No	Yes
Description and evaluation of economic and environmental benefits and costs of the proposed action?	Yes*	Yes
Description of the relationship between local short-term uses of man's environment and long-term productivity of the environment?	No	Yes
Description and analysis of reasonable alternatives including the no action alternative that may or may not be within the jurisdiction of the agency?	Yes, when alternatives are reasonably available. (EA rules omit jurisdictional language)	Yes
An explanation of the tradeoffs among the reasonable alternatives?	Yes*	Yes
Agency's preferred alternative identified and its reasons for the preference explained?	Yes*	Yes
Listing and an appropriate evaluation of mitigation, stipulations, or other control measures enforceable by the agency or another government agency?	Yes	Yes
Discussion of any compensation related to the impacts from the proposed action?	No	Yes
Listing of other agencies and groups that have been contacted or have contributed to the document?	Yes	Yes
Listing of names consisting of those individuals responsible for preparing the document?	Yes	Yes
Finding of need for an EIS and if EIS not required, a description of the reasons the EA is the appropriate level of review?	Yes	No

* Note that these rule requirements are not explicitly stated in the EA MEPA rules. However, by their very nature, the EA MEPA rules generally require some form of discussion and analysis here. The scope and depth of the analysis is discretionary.

Figure 17.

SECTION VI - MEPA Handbook

Overview of the Steps of Environmental Analysis

Steps of Environmental Analysis

Recall that when an agency proposes to take an action that triggers MEPA, the agency is required to conduct a "systematic," "interdisciplinary" analysis of the probable consequences or impacts of the proposed action.

The analysis must be "systematic", meaning that the elements must be logically organized and each element must complement and build on the other. However, this does not mean that the environmental review process is linear, i.e., that steps 1 and 2 must be completed in order before step 3. Agency resources, and the timing in which information is received can both dictate the order in which environmental review elements are addressed.

MEPA review is flexible and cyclic--requiring the agency to reevaluate any appropriate element of the process if the agency discovers any new or important information, or makes significant changes in the proposed action that could affect the human environment.

The MEPA analysis must also be "interdisciplinary" in that the people assigned to conduct the analysis must have the requisite expertise in those areas of the human environment that may be affected by the proposed action. The "interdisciplinary" approach necessitates collective or group analysis-- insuring that multi-disciplinary ideas are effectively communicated and discussed in the environmental review process.

This "systematic" and "interdisciplinary" analysis must take place before a decision is made or an action is taken. It is imperative that the analysis be objective and that it be utilized to formulate the decision--not justify a decision that has already been made.

So what are the elements of the environmental review process? The MEPA Model Rules provide you with a series of blueprints for each environmental review document. In Appendix D there are a series of environmental document content checklists taken from the MEPA Model Rules. Appendix D includes checklists for EAs, DEISs, FEISs, and Supplements to EISs. Each time you prepare an environmental review document, you should refer to these checklists and your rules to insure that each requirement has been adequately addressed.

As noted previously, there are certain elements common to environmental analysis, regardless of whether you are writing an EA or an EIS. It is helpful in visualizing this process to illustrate a standard topical outline for a generic environmental review document (EA or EIS) (note figure 18). Generally, those elements include:

* **the purpose and need of the proposed action;**

* **a description of the affected environment;**

* **a description and analysis of the alternatives including the no action alternative; and**

ELEMENTS OF ENVIRONMENTAL REVIEW

PURPOSE AND NEED OF THE PROPOSED ACTION

* Describe the proposed action (including maps and graphs) and explain the benefits and purpose of the proposed action.
* Explain the decisions that must be made regarding the proposed action.
* Acknowledge and explain the concerns and issues that have been generated through public and agency comment.
* List any other local, state, or federal agency that has overlapping jurisdiction or responsibility for the proposed action. Include a list of all necessary permits and licenses.
* Identify and describe any other environmental review documents that influence or supplement this document.

AFFECTED ENVIRONMENT

* Overview: explain that this section describes those aspects of the existing environment which are relevant to the issues that have been expressed and provides a "baseline" from which to discuss environmental effects.
* Discuss those aspects of the human environment affected by each identified issue.

ALTERNATIVES, INCLUDING THE PROPOSED ACTION

* Overview: explain that this section describes the alternatives and summarizes the environmental consequences of each alternative.
* Describe how these alternatives were developed and explain reasons for eliminating some of the alternatives from detailed study.
* Describe each alternative that is considered in detail, including the "no action" alternative.
* Concisely compare the alternatives by summarizing their environmental consequences.

ENVIRONMENTAL CONSEQUENCES (IMPACT ANALYSIS)

* Overview: explain that this section forms the analytic basis for the concise comparison of alternatives noted above. Also explain that this section scientifically analyzes the direct, secondary, and cumulative impacts of the proposed action and each of the alternatives noted above.
* Describe the scientific/analytic methods used to assess the impacts.
* Describe the anticipated direct, secondary and cumulative impacts associated with each alternative.
* List and discuss the effectiveness of any mitigation, stipulation, or other control measures for each alternative.

Source: Shipley & Associates, Applying the NEPA Process; Montana Dept. of State Lands, Forestry Division, Applying MEPA to Forest Management Activities.

Figure 18.

Overview of the Steps of Environmental Analysis

Steps of Environmental Analysis (continued)

*** an analysis of the environmental consequences or impacts of the different alternatives.**

Figure 18 provides a detailed overview of these elements. Subsequent subsections will discuss and analyze each element in detail.

Depth and Scope of Analysis

The level or depth of analytic detail and analysis devoted to each environmental review element will depend on the magnitude of the agency's proposed action and the range of issues raised by the public during initial scoping and comment periods. Determining the scope or depth of analysis and the appropriate detail required to adequately evaluate the proposed action requires you to assess:

(1) the complexity of the proposed action;

(2) the environmental sensitivity of the area;

(3) the degree of uncertainty that the proposed action will have a significant impact; and

(4) the need for and complexity of mitigation required to avoid the presence of significant impacts.

(MEPA Model Rule V(2)).

For routine actions with limited environmental impact a standard checklist EA may be used (note model EA Checklist in Appendix C). As the complexity of the impacts increases, the evaluation and analysis must both be more substantial.

Again, note that there is no magic formula or equation to tell you what depth or scope of environmental review is appropriate. While MEPA and the MEPA Model Rules provide a range of criteria to aid you in making those decisions, the decisions necessarily entail a great deal of discretion. This is one of the more frustrating as well as stimulating aspects of MEPA implementation.

A question that is often asked is "when is enough analysis really enough?" As long as you document your reasons for selecting a given level of analysis and that reasoning is rational, then your chances of achieving a well informed decision and a legally defensible document are substantially improved. There are few absolute answers in the MEPA process.

Big Cutthroat Creek Dinosaur Dig Example

Figure 19 provides you with a description of the Big Cutthroat Creek Dinosaur Dig example. A map of the Big Cutthroat Creek site is provided in figure 20. This example is designed to illustrate general environmental review process applications. During the training seminar instructors will be referring to this example throughout Section VI.

BIG CUTTHROAT CREEK DINOSAUR DIG HYPOTHETICAL

SCENARIO:

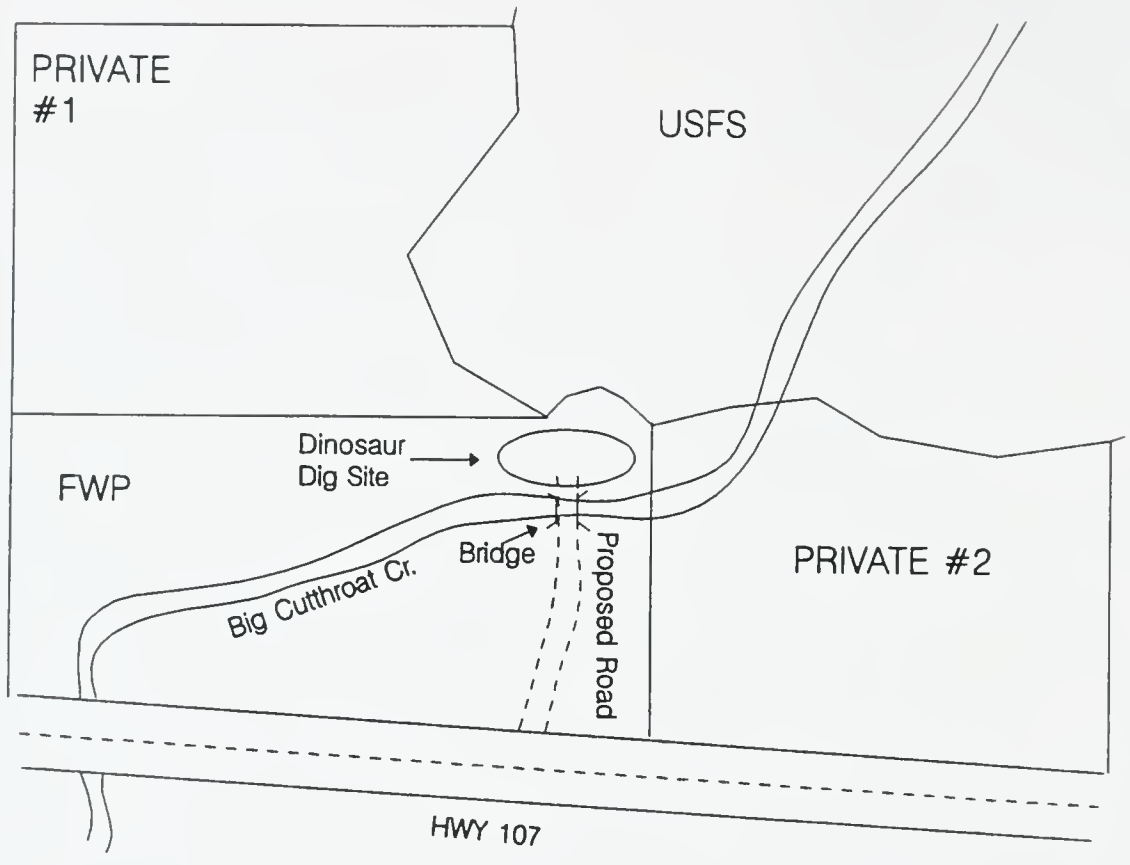
A philanthropist has donated to the department of Fish, Wildlife, & Parks a 640 acre parcel of property along the front range. A nationally significant dinosaur dig site that has already been excavated by Montana State University is located on the property. The department accepted the donation with the understanding that an interpretive center would be developed and that the site would become a state park.

The property is strategically located for the department (see figure 20 for map) in that it provides elk and deer hunting access to thousands of acres of U.S. Forest Service land, access that previously was controlled by adjacent private landowners. The Big Cutthroat creek, a blue ribbon fishery and important spawning tributary, also flows through the property.

The Parks Division of Fish, Wildlife, & Parks is proposing to build a road from the highway to the dig site, including a bridge across Big Cutthroat creek. The Parks Division also plans to construct an interpretive center near the dig site.

Figure 19.

BIG CUTTHROAT CREEK
DINOSAUR DIG LOCATION MAP



LOCATION: Teton County, 20 miles west of Bynum, TS 26N, R 8W, Section 1.

Figure 20.

Overview of the Steps of Environmental Analysis

Big Cutthroat Creek Dinosaur Dig Example (continued)

During the training seminar, in addition to the Big Cutthroat Creek example, there are group exercises developed and tailored according to MEPA issues identified by your agency. These group exercises hopefully will further reinforce how to apply the environmental review elements set out in this section. The generic group exercise tasks are set out in the text of the handbook utilizing the following format:

GROUP EXERCISE #1:

Write a description of.....

Handouts for each exercise are located in the back sleeve of the handbook.

SECTION VI - MEPA Handbook

Purpose and Need of the Proposed Action

Introduction

This subsection explains how to draft a "Purpose and Need of the Proposed Action" statement. Training objectives include (1) learning the elements of a purpose and need statement; and (2) writing a sample statement.

Elements of the Purpose and Need of the Proposed Action Statement

There are five general elements that must be addressed in a "Purpose and Need of the Proposed Action" statement (hereafter referred to as the "purpose statement.") (note figure 21). These include:

* **A description of the proposed action (including maps and graphs) and explanation of the benefits and purpose of the proposed action;**

* **An explanation of the decision(s) that must be made regarding the proposed action;**

* **An acknowledgment and explanation of the concerns and issues that have been generated through public and agency comment;**

* **A list of any other local, state, or federal agencies that have overlapping or additional jurisdiction or responsibility for the proposed action. Also a list of all necessary permits and licenses; and**

* **A description of any other environmental review documents that influence or supplement this document.**

(Source: Shipely & Associates, Applying the NEPA Process)

1. PROPOSED ACTION/PURPOSE AND NEED

The first element requires an agency to identify and explain the proposed action and demonstrate the benefits of, and need for, the proposed action. A "proposed action" is a proposal by an agency to authorize, recommend or implement an action. In order to effectively describe a "proposed action" you must explain in general terms:

(1) **WHO** is proposing the action?

(2) **WHAT** is the action that is being purposed?

(3) **WHERE** is the action proposed (including maps)?

(4) **HOW** does the agency propose to implement (generally) the proposed action? and

(5) **WHEN** will the action start and what will be its duration?

(Source: U.S. Forest Service, 1900-01 Training Manual)

Figure 22 illustrates a proposed action for the Big Cutthroat Creek example.

Once you have described the proposed action you then must address the following question:

FIVE ELEMENTS OF A PURPOSE AND NEED STATEMENT

1. PROPOSED ACTION/PURPOSE AND NEED

Describe the proposed action (including maps and graphs) and explain the benefits and purpose of the proposed action.

2. DECISIONS TO BE MADE

Explain the decisions that must be made regarding the proposed action.

3. ISSUE STATEMENT

Acknowledge and explain the concerns and issues that have been generated through public and agency comment.

4. JURISDICTION

List any other local, state, or federal agency that has overlapping or additional jurisdiction or responsibility for the proposed action. Include a list of all necessary permits and licenses.

5. OTHER ENVIRONMENTAL REVIEW DOCUMENTS

Identify and describe any other environmental review documents that influence or supplement this document.

Source: Shipley & Associates, Applying the NEPA Process.

Figure 21.

BIG CUTTHROAT CREEK PROPOSED ACTION DESCRIPTION

WHO is proposing the action?

Parks Divisions of Fish, Wildlife and Parks

WHAT is the action that is being proposed?

Construction of a Dinosaur Dig Interpretive Center

WHERE is the action proposed?

Teton County, 20 miles west of Bynum on Highway 107. Township: 26N, Range: 8W, Section 1. Note Map in Figure 20.

HOW does the agency propose to implement (generally) the proposed action?

The proposed action is to construct a half mile gravel road from highway 107 to the dig site including a bridge across Big Cutthroat creek. The proposed action also includes building a parking lot and constructing an interpretive center near the dig site.

WHEN will the action start and what will be its duration?

Construction is proposed to begin in May of 1993. Construction is projected to be completed in September of 1993.

(Source: Adapted from the U.S. Forest Service, 1900-01 Training Manual)

Figure 22.

Purpose and Need of the Proposed Action

Elements of the Purpose and Need of the Proposed Action Statement (continued)

WHY is the agency considering this proposed action?

In answering the **"WHY"** question, the purpose, need, and benefits of the proposed action are discussed. Typically, an agency has identified a need to pursue a certain action in order to fulfill its statutory mission, meet agency planning objectives, or respond to entitlement (permits, licenses, leases, etc.) requests.

The purpose of the proposed action is to satisfy an agency's identified "need". In discussing the purpose, you should explain the objectives and benefits of the proposed action. Figure 23 provides an illustration of this process. It is critical in writing this part of the purpose statement to keep in mind "why" the agency is initiating this action.

GROUP EXERCISE #1:

Write a description of the proposed action outlined in Handout #1 and explain why the action is being proposed (purpose, need, objectives).

---

2. **DECISIONS TO BE MADE**

The second element that must be addressed in the purpose statement is an explanation of the decisions that must be made in regard to the scope of the proposed action. Take for example the Big Cutthroat Creek example used in figures 22 and 23. The decision that must be made regarding the proposed action is whether to construct an interpretive center, road, parking lot, and bridge as proposed and if so, how? Specifying the decision(s) to be made in turn clarifies the no action alternative--not satisfying the identified need (i.e., the Park's Division's statutory mandate to hold, maintain and improve sites of scientific or historical value) for the action.

3. **ISSUE STATEMENT**

The third element in the purpose statement requires the agency to summarize and explain the relevant concerns and issues that were identified in public and agency scoping (if applicable). This summary is known as an "issue statement". It is important at this juncture to understand what is meant by the term "issue". An issue is:

> **a clear statement of a resource that might be adversely affected by some specific activities that are part of a proposed way to meet some objective(s)--stated another way, an issue is a problem or unresolved conflict that may arise should the agency's objectives be met as proposed.**

(Source: Shipley & Associates, Applying the NEPA Process)

Issues and agency project objectives systematically drive MEPA's environmental review process. The issue statement essentially sets the stage for how alternatives will be developed, identifies the affected environment, and specifies those resources that will be evaluated in the

BIG CUTTHROAT CREEK PURPOSE AND NEED

PROPOSED ACTION: The Parks Division of the Montana Department of Fish, Wildlife, and Parks proposes to construct the Dinosaur Dig Interpretive Center in Teton Co., 20 miles west of Bynum on Highway 107. Construction is proposed to begin in May, 1993 and be completed in September, 1993.

PURPOSE, NEED, AND BENEFITS OF THE PROPOSED ACTION:

WHY is the agency considering this proposed action?

* NEED:
  - -The Department of Fish, Wildlife, and Parks has a statutory mandate to hold, maintain, and improve sites of historic and scientific value (23-1-102, MCA).
  - -The Big Cutthroat Creek Dinosaur Dig is a site of national significance to which the public could not otherwise gain access.

*PURPOSE:
  - -Create public access to the Big Cutthroat Creek Dinosaur Dig.

*OBJECTIVES/BENEFITS:
  - -Increase the public's knowledge about and appreciation of prehistoric Montana.
  - -Provide hunting access to adjacent U.S. Forest Service land.
  - -Meet public demand for increased recreational opportunities along the well-traveled corridor between Yellowstone and Glacier National Parks.

Figure 23.

Purpose and Need of the Proposed Action

Elements of the Purpose and Need of the Proposed Action Statement (continued)

analysis of environmental consequences and impacts. It is critical that the statement be well organized, clear, and well defined.

There are eleven steps in issue statement development (see figure 24):

(A) identify sources of preliminary issues;

(B) compile a list of identified issues;

(C) determine which issues are relevant to the proposed action;

(D) organize/group identified issues in terms of resources affected;

(E) identify those specific project or program related actions that give rise to each issue you have identified;

(F) for each project or program related action identified specify the location of the action and the location of that action's effects on each resource;

(G) specify when each project or program related action will occur and determine the timing for each action's effects.

(H) for each project or program related action (or series of actions) state the cause and effect manner in which the action would cause the effect(s) to occur (either directly, secondarily, or cumulatively);

(I) determine the depth and level of analysis each issue should receive;

(J) identify appropriate units of measure for the issues you plan to analyze;

(K) clarify the issues in the form of a clear and precise issue statement; and

(L) set up an issue tracking system for your environmental document.

(Source: U.S. Forest Service, 1900-01 Training Manual; Shipley & Associates, Applying the NEPA Process)

Step (A) requires you to identify the potential sources of issues generated by the proposed action. Issue sources include:

*** agency statutory mandates;**

*** issues, concerns, and opportunities identified in agency planning documents;**

*** issues generated from compliance with other laws or regulations;**

*** current internal concerns;**

*** changes in public uses, attitudes, values or perceptions;**

*** issues raised by the public during scoping and comment;**

*** comments from other government agencies;**

STEPS IN ISSUE STATEMENT DEVELOPMENT

(A) identify sources of preliminary issues;

(B) compile a list of identified issues;

(C) determine which issues are relevant to the proposed action;

(D) organize/group identified issues in terms of resources affected;

(E) identify those specific project or program related actions that give rise to each issue you have identified;

(F) for each project or program related action identified specify the location of the action and the location of that action's effects on each resource;

(G) specify when each project or program related action will occur and determine the timing for each action's effects.

(H) for each project or program related action (or series of actions) state the cause and effect manner in which the action would cause the effect(s) to occur (either directly, secondarily, or cumulatively);

(I) determine the depth and level of analysis each issue should receive;

(J) identify appropriate units of measure for the issues you plan to analyze;

(K) clarify the issues in the form of a clear and precise issue statement; and

(L) set up an issue tracking system for your environmental document.

(Source: U.S. Forest Service, 1900-01 Training Manual; Shipley & Associates, Applying the NEPA Process)

Figure 24.

Purpose and Need of the Proposed Action

Elements of the Purpose and Need of the Proposed Action Statement (continued)

*** issues raised by identifying changes to the existing condition of resources that might be affected by the proposed action; and**
*** others.**

(Source: U.S. Forest Service, 1900-01 Training Manual; Shipley & Associates, Applying the NEPA Process)

Once you have identified the sources of potential issues, **Step (B)** requires that you solicit and list all preliminary issues. Do not, at this stage of issue development, eliminate any issue from your list regardless of how absurd or inane a given issue might be. Figure 25 lists a series of issues that have been identified for the Big Cutthroat Creek Dinosaur Dig.

Step (C) requires you to select and identify relevant issues. There are two general categories of issues: relevant and non-relevant. Relevant issues are those types of issues that will be used to distinguish between the alternatives you have generated. Relevant issues tend to have one or more of the following common attributes:

*** the agency is uncertain whether the impacts associated with the issue are significant;**

*** the agency is uncertain about the impacts associated with the issue or the effectiveness of the mitigation measures; or**

*** an unresolved conflict remains--i.e., there is disagreement between the agency and one or more parties as to the agency's understanding of the issue and the impacts associated with the issue or the effectiveness of mitigation measures.**

(Source: MT Department of State Lands, Forestry Division, Applying MEPA to Forest Management Activities)

Non-relevant issues are those that do not help the agency distinguish between alternatives. These types of issues share one or more of the following attributes:

*** they are beyond the scope of the proposed action;**

*** there are no remaining unresolved conflicts (both the agency and the party who identified the issue are satisfied);**

*** the issue is immaterial to the decision;**

*** the issue is not supported by scientific evidence; or**

*** the issue has already been decided by law.**

(Source: MT Department of State Lands, Forestry Division, Applying MEPA to Forest Management Activities; U.S. Forest Service, 1900-01 Training Manual)

You should identify issues considered but eliminated from detailed analysis. Explain and document why these issues were eliminated (i.e., relevant or non relevant). Get the decision-maker's concurrence on the final list of issues to

CUTTHROAT CREEK PRELIMINARY ISSUES

* Constructing the bridge may cause sedimentation;

* The trees lost from road construction may increase the greenhouse effect;

* Development may displace wildlife;

* Increased hunter access may reduce the deer population;

* The dig site may be vandalized;

* The Cutthroat population may be affected by increased sediment and fishing pressure;

* The concession stand that private landowner #2 is proposing may make the site too commercialized;

* There may be an endangered wildflower, the Purple Ladyslipper; and

* Road construction may expose additional dinosaur remains.

Figure 25.

Purpose and Need of the Proposed Action

Elements of the Purpose and Need of the Proposed Action Statement (continued)

be included in the purpose statement. Inform the public of that final list of issues.

Step (D) requires you to organize and group your preliminary identified issues by common resource (see figure 26). Note that there are other methods of organizing issues other than by resource. They include:

*** CAUSE-EFFECT RELATIONSHIPS-- increased erosion from a bridge (issue #1) leads to increased sediment in streams (issue #2) which leads to increased sediments in spawning gravel (issue #3); and**

*** COMMON GEOGRAPHY-- parking at dinosaur park, trash removal in the dinosaur park, camping in the dinosaur park--the dinosaur park is one geographic component of the proposed action; or**

*** SAME ACTIONS--grouping issues associated with hunter access versus road construction versus site preparation.**

Utilize whatever method suits your circumstances best. However, organizing your issues in terms of common resource tends to be easier than the other methods and saves you time when you organize your "affected environment" and "environmental consequences" sections. Organizing by resource also simplifies your issue statement.

Step (E) requires you to identify those specific project or program related actions that give rise to each issue you have identified. Stated differently, what specific actions is the agency proposing to take that prompt the issues you have identified? This step requires you to analyze and define the relationship between the actions your agency is proposing to take and the issues generated by those actions. For example, the proposed action of building a bridge across Big Cutthroat Creek has raised the issue of sedimentation and its effects on the the creek's fishery. Systematically review and identify proposed actions which cause the issues that have been raised.

Step (F) requires that for each project or program related action identified, you specify the location of the action and the location of that action's effects on each resource. Actions effecting a resource may be different depending on where the action is located. Effects from the action may be located on site (direct or primary effects) or off site (secondary and/or cumulative). Locating where the actions and the effects are located is very important because this defines the scope of your issues and is a helpful tool in formulating your alternatives (i.e., tinkering with different action locations may minimize adverse effects).

Step (G) requires that you identify when each action will occur and determine the timing for each action's effects. Again, this is an extremely critical step in that it helps identify the intensity of any impact. For example, if the Parks Division limited public access to the dinosaur dig site to only three months out of the year, the potential impacts on the site

CUTTHROAT CREEK ISSUES ORGANIZED BY RESOURCE

Resource: WILDLIFE

* Development will displace wildlife;

* Increased hunter access will reduce the deer population;

Resource: Water Quality

* Constructing the bridge will cause sedimentation;

Resource: Fisheries

* The Cutthroat population will be affected by increased sediment and fishing pressure;

Resource: Vegetation

* There may be an endangered wildflower, the Purple Ladyslipper; and

* The trees lost from road construction will increase the greenhouse effect;

Resource: Cultural/Historical

* The dig site may be vandalized;
* Road construction may expose additional dinosaur remains.

Other:

* Private landowner's concession stand will make the site too commercialized.

Figure 26.

Purpose and Need of the Proposed Action

Elements of the Purpose and Need of the Proposed Action Statement (continued)

from public use may be less than if the public had year round access.

For each project or program related action (or series of actions) **Step (H)** notes that you must state the cause and effect manner in which a given identified action would cause the effect(s) to occur (direct, secondary, and/or cumulative). For example, the action of constructing the bridge over Cutthroat Creek could cause a direct increase in the levels of sediment found in the creek's water. This direct increase could result in secondary impacts on the Cutthroat fishery population in the creek. Cumulatively, the increase in sedimentation caused by the bridge and taken in conjunction with other sources of sedimentation (i.e., U.S. Forest Service and private landowner timber cutting activities upstream and down stream) could completely wipe out the fishery. This type of cause and effect thought process sets the stage for estimating the environmental consequences of the proposed action.

After you have identified relevant issues, organized them, identified actions that generate those issues, specified the timing and location of those actions and their effects, and analyzed the cause and effect relationship of your identified actions to the resources that might be affected, you should have a good sense of the level of analysis each issue should receive in the environmental review document.

Step (I) requires you to determine the depth and scope of review each issue should receive. Recall that a relevant issue is one that helps you generate and evaluate alternatives to the proposed action. The extent (geographic distribution of the issue), duration (length of time the issue is likely to be of interest), and intensity (level of interest or conflict generated by the issue) of a relevant issue will determine the level of analysis devoted to it. The less important the issue is in terms of the above criteria, the less attention need be paid to it in your environmental review document.

Step (J) requires that you identify appropriate units of measure for the issues you plan to analyze. Select units of measure that are:

* **quantitative where possible;**
* **measurable;**
* **predictable;**
* **responsive to the issue; and**
* **linked to cause and effect; relationships.**

(Source: U.S. Forest Service, 1900-01 Training Manual)

Choosing the units of measure at the front-end of the environmental review process insures constancy through out the document. It also sets the stage for measuring and estimating the environmental consequences.

Step (K) requires you to clarify the issues in the form of clear and concise statements. A statement of the issues should be written without bias. It should illustrate the conflicts or the problems between the proposed

Purpose and Need of the Proposed Action

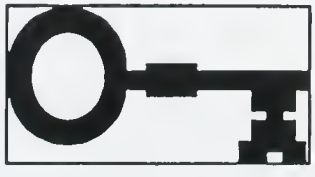
Elements of the Purpose and Need of the Proposed Action Statement (continued)

action and probable consequences (show cause-effect relationships). It should be as specific as possible. If there is confusion concerning your understanding of the issue, go back to the source for clarification. Figure 27 illustrates an issue statement format for a specific Cutthroat Creek issue: water quality. You may find the format in figure 27 useful in organizing and writing your issue statements.

Finally, **Step (L)** of the issue statement development process notes that it is wise to set up some type of issue tracking system for your environmental review document. An issue tracking system is invaluable in assisting you manage issues through the environmental review process. The U.S. Forest Service has developed a tracking system that can be used in either a paper or electronic form (note figure 28). The tracking system is organized by issues and environmental review elements as noted in figure 28. The tracking system also acts as an organizational index for your document record (see Section IX).

Developing an issue statement is a complex and sometimes very time-consuming process. However, the more effort you put into the issue development process, the easier it will be to develop and write the other environmental review sections.

Remember that defining the issues (unresolved conflicts) is the key to ultimately resolving them.



4. JURISDICTION

The fourth element of the purpose statement involves listing those governmental agencies with overlapping jurisdiction. You should also include a list of all necessary permits and licenses that are required. This information is helpful in explaining who the involved parties are and what specific actions need to be taken and by whom.

5. OTHER ENVIRONMENTAL REVIEW DOCUMENTS

The final element of the purpose statement requires you to identify and describe any other environmental review document that influences or supplements this document. If you are tiering (refer to the glossary for an explanation) your current document to past or present environmental review documents, then you should explain what parts of each document you are referencing.

GROUP EXERCISE #2:

Using Figure 27 as an example, write an issue statement based on the information outlined in Handout #2.

CUTTHROAT CREEK ISSUE STATEMENT FOR WATER QUALITY

RESOURCE: Cutthroat Creek Water Quality

THE EFFECT: Increased instream sedimentation.

THE ACTION: Construction of a bridge over Cutthroat Creek to access the dinosaur dig site.

LOCATION: The action (bridge construction) would take place in the northwest corner of the property near the dinosaur dig site. The effect (sedimentation) would take place downstream from the bridge construction site.

TIMING: The action will take place during the construction period of spring and summer. The effect (sedimentation) would be triggered during construction and continue for up to a year after construction was completed.

CAUSE-EFFECT: The action of constructing the bridge over Cutthroat Creek would cause a direct increase in the levels of sediment found in the creek's water. This direct increase could result in secondary impacts on the Cutthroat fishery population in the creek. Cumulatively, the increase in sedimentation caused by the bridge and taken in conjunction with other sources of sedimentation (i.e., U.S. Forest Service and private landowner timber cutting activities up stream and down stream) could completely wipe out the fishery.

(Source: Adapted from Shipley & Associates, Applying the NEPA Process)

Figure 27.

ISSUE TRACKING SYSTEM

	Issue Statement	Source	Resource(s)	Soc/Econ Value(s)	Alternatives
1 2 3 4 5 6	State issue as it appears in the env. review document.	Where did the issue come from?	What biological or physical resources will be affected?	What social and economic values will be affected?	What alternatives address this issue?

	Aff.Env. page(s)	Env. Consq.	Comment/Response	Mitigation	Monitoring
1 2 3 4 5 6	Where in EA/EIS is issue addressed?	Where in EA/EIS is issue addressed?	What comments and responses address this issue?	Is mitigation necessary to resolve this issue? Where is it?	How will the monitoring be done?

	Resolution in the PA	ROD	Permit Terms/Cond		
1 2 3 4 5 6	Is this issue resolved in the preferred alternative? If so, how?	Is issue covered in the decision document?	What terms/ conditions address this issue?		

(Source: U.S. Forest Service, 1900-01 Training Manual)

Figure 28.

SECTION VI - MEPA Handbook

The Affected Environment

Introduction

This subsection explains how to describe the affected environment. Training objectives include identifying and describing those resources which are affected by the proposed action.

Describing the Affected Environment

After you have described the purpose and need of the proposed action, you must identify those resources in the human environment that will be affected by the proposed action (note figure 29). MEPA and the MEPA model Rules do not require a description of every resource of the human environment--only those resources that relate to the relevant and important issues must be identified and analyzed.

Describing the affected environment serves three purposes:

(1) it provides a baseline from which to analyze and compare alternatives and their impacts;

(2) it ensures that the agency has a clear understanding of the human environment that would be impacted by the proposed action; and

(3) it provides the public with a frame of reference in which to evaluate the agency's alternatives including the proposed action.

(Source: U.S. Forest Service, 1900-01 Training Manual; MT Department of State Lands, Forestry Division, Applying MEPA to Forest Management Activities)

In writing this section, you should be concise but thorough. Utilize quantitative units of measure when ever possible. These units of measure should be measurable, predictable, and responsive to the identified issues. Consult the decision-maker to ensure that all resources and issues have been identified.

There is a simple and efficient way to organize the affected environment section (see figure 30). Begin by identifying and describing each resource that is affected by the proposed action. Under each resource list the applicable issues that were identified in the issue statement. Under each issue describe:

*** the area in which the resource is impacted;**

*** measure the existing condition of the resource; and**

*** identify potential cause and effect relationships that will effect the existing conditions.**

The order in which you address the resources and issues in this section should be the same for the environmental effects section of the MEPA analysis (page 73). In fact, it is not uncommon to combine both the affected environment and the environmental effects into one continuous and sequential analysis.

ELEMENTS OF THE AFFECTED ENVIRONMENT SECTION

* **Overview: explain that this section describes those aspects of the existing environment which are relevant to the issues that have been expressed and provides a "baseline" from which to discuss environmental effects.**

* **Discuss those aspects of the human environment affected by each identified issue.**

(Source: Shipely & Associates, Applying the NEPA Process)

Figure 29.

AFFECTED ENVIRONMENT ILLUSTRATION FOR CUTTHROAT CREEK

(1) Resource # 1: Cutthroat Creek Water Quality

a) Issue #1: nitrate loading from the interpretive center's waste disposal system.

1. **Describe area to be impacted by nitrate loading.**
2. **Measure current nitrate concentrations.**
3. **Identify and describe current sources of nitrate loading.**

b) Issue #2: sedimentation from bridge construction

1. **Describe area likely to be impacted by sedimentation.**
2. **Measure current sedimentation rates.**
3. **Identify and describe current sources of sedimentation.**

(2) Resource # 2: Cutthroat Creek Wildlife

a) Issue # 1: hunter access created by opening up the Cutthroat Creek Property

1. **Describe area and animals likely to be impacted by hunter access.**
2. **Measure current quantity and quality of animal populations.**
3. **Identify and describe current sources of hunter access into the area.**

b) Issue # 2: hiding cover lost due to clearing for interpretive center and road (apply same analysis)

(Source: Adapted from Shipley & Associates, Applying the NEPA Process)

Figure 30.

SECTION VI - MEPA Handbook

Alternatives

Introduction

This subsection explains how to develop reasonable alternatives. Training objectives include: (1) evaluating reasonable alternatives; (2) describing how those alternatives are developed and explaining reasons for eliminating some alternatives from detailed study; and (3) comparing the alternatives by summarizing their environmental consequences.

Reasonable Alternatives

The MEPA Model Rules require that you describe and analyze reasonable alternatives to the proposed action including the "no action" alternative. This is the heart and soul of the environmental review document. If done objectively, an alternative analysis provides a clear basis for choice by comparing impacts and sharply defining the issues.

Formulating alternatives to the proposed action is a process of using different means and/or approaches to accomplish the same objective as the proposed action. A comparison of different alternatives may help to either identify hidden assumptions or validate the rationale behind a proposed action.

A "reasonable" alternative is one that is practical and\or feasible from a technical and economic stand point--using common sense. A reasonable alternative should fulfill the purpose and need of the proposed action and will address significant and relevant issues.

Regardless of whether you are preparing an EA or EIS, the MEPA Model Rules require that you analyze the "no action" alternative. According to CEQ's "Forty Most Asked Questions", there are two interpretations of "no action" depending on the nature of the proposal being evaluated:

(1) no change from the current status quo; or

(2) the proposed action does not take place.

The first interpretation usually involves a situation where current management or ongoing program actions are taking place even as new plans or programs are being developed (that trigger the MEPA process). In these situations, the "no action" alternative is no change from current management or program direction or level of management or program intensity.

The second interpretation usually involves state agency decisions on proposals for projects. "No action" under this interpretation would mean the proposed project would not take place.

You should use the interpretation of a "no action" alternative that results in the least change to the environment from the current situation--both favorable and unfavorable.

The "no action" alternative provides a baseline or point of reference for evaluating the environmental effects of other alternatives. It provides a comparison of environmental conditions without the proposal. The "no action" alternative must be considered, even if it fails to meet the purpose and need or is illegal.

Recall that there are a number of

Alternatives

Reasonable Alternatives (continued)

ways to generate reasonable alternatives. The development of the proposed action, identification of the proposed action's objectives, initial scoping and development of relevant and/or important issues, should all influence the generation of alternatives. Where there is substantial disagreement (unresolved conflict), provide an alternative for each point of view (address each issue).

The work you invested in developing the issue statement for the proposed action will be invaluable in generating and evaluating reasonable alternatives. Shipley and Associates have developed a logical and systematic approach to developing reasonable alternatives that is very helpful:

(1) Develop and describe in detail the "no action" alternative.

(2) Identify and list each site-specific action listed in your issue statement, including location and timing factors you generated for each action and effect.

(3) For each action, generate detailed actions that could be used to modify or replace the listed problem actions to mitigate the effects stated in the issue statement. Note that the MEPA Model Rules require you to identify mitigation and stipulation measures. Mitigation measures are designed to reduce or prevent undesirable effects or impacts of your identified actions. There are a number of ways to mitigate:

*** avoid the impact by not taking action;**

*** minimize the impact by limiting action;**

*** rectify the impact by rehabilitation;**

*** reduce the impact by maintenance; or**

*** compensate for the impact by replacement. (MEPA Model Rule II (14)).**

Generate as many reasonable actions as you can for each listed action in your issue statement.

(4) Cluster the mitigation into reasonable and feasible packages that meet the proposal objectives. Note that each alternative must include all connected actions to be a complete, implementable alternative.

(5) Identify any mitigation measures that will be common to all action alternatives.

(6) Any reasonable actions not built into an alternative are alternatives considered but not in detail.

(Source: Shipley & Associates, Applying the NEPA Process)

Make sure that you fully and concisely document how each reasonable alternative was developed. Explain the reasons for eliminating some alternatives from detailed study. Possible reasons to eliminate an alternative include:

*** the alternative is illegal;**

Alternatives

Reasonable Alternatives (continued)

*** it is technologically unfeasible;**

*** the alternative fails to meet the purpose and need of the proposed action;**

*** it is clearly unreasonable;**

*** analyzing the alternative would result in duplication;**

*** the alternative cannot be implemented; or**

*** the alternative is too remote or speculative.**

(Source: U.S. Forest Service, 1900-01 Training Manual)

Whatever the reason for elimination, always thoroughly document it.

GROUP EXERCISE # 3:

Generate an array of reasonable alternatives using the Shipley Method described on page 70. Information in Handout #3 will assist your group in this process.

Comparing Alternatives

The alternatives chosen for detailed study (including the "no action" alternative) should be compared and contrasted by summarizing their environmental consequences. Each alternative should receive equal treatment so that reviewers may evaluate their comparative merits. The alternatives should be described objectively and be as site-specific as possible. Matrices, graphs, tables, are very helpful in assisting the reader in understanding and visualizing the differences among the alternatives (see figure 31).

An alternative comparison should include what the decision-maker needs for a reasoned and well informed choice. It should also be clear and readable so the public can understand how and why the decision-maker made a given choice.

COMPARING ALTERNATIVES: A SAMPLE MATRIX OF ENVIRONMENTAL CONSEQUENCES FOR CUTTHROAT CREEK

	ALTERNATIVES		
	NO ACTION	ALT A	ALT B
Issue 1-water quality	0	increase sediment load 20%	increase sediment load 50%
Issue 2-wildlife habitat	0	100 acres of habitat loss	500 acres of habitat loss
Issue 3-nitrate loading	0	increase nitrate loading by 15%	increase nitrate loading by 35%

(Source: Adapted from U.S. Forest Service, 1900-01 Training Manual; Shipley & Associates, Applying the NEPA Process)

Figure 31.

SECTION VI - MEPA Handbook

Environmental Consequences/Impacts

Introduction

This subsection illustrates how to analyze the direct, secondary, and cumulative impacts of the proposed action and each alternative. Training objectives include: (1) understanding the concepts of direct, secondary, and cumulative impacts; and (2) conducting impact analysis.

Defining the Impacts

All of the environmental review elements previously discussed either shape or define the environmental consequences of the proposed action (note figure 32). The purpose and need, issues and alternatives help define the scope of the environmental effects analysis. Monitoring and mitigation respond to the environmental effects. And, the significance of the effects helps establish the level of analysis and documentation.

When conducting an environmental effects analysis, you should use effects that:

* display a sharp contrast between the alternatives;

* provide a comparison of alternatives with respect to significant and/or relevant issues; or

* provide a clear basis for choice among alternatives.

Under the MEPA Model Rules, you are required to analyze the environmental effects in terms of the direct, secondary, and cumulative impacts on the physical and human environment. This means that direct, secondary, and cumulative analysis should be completed for all resources that are raised and identified as relevant issues in the initial scoping process.

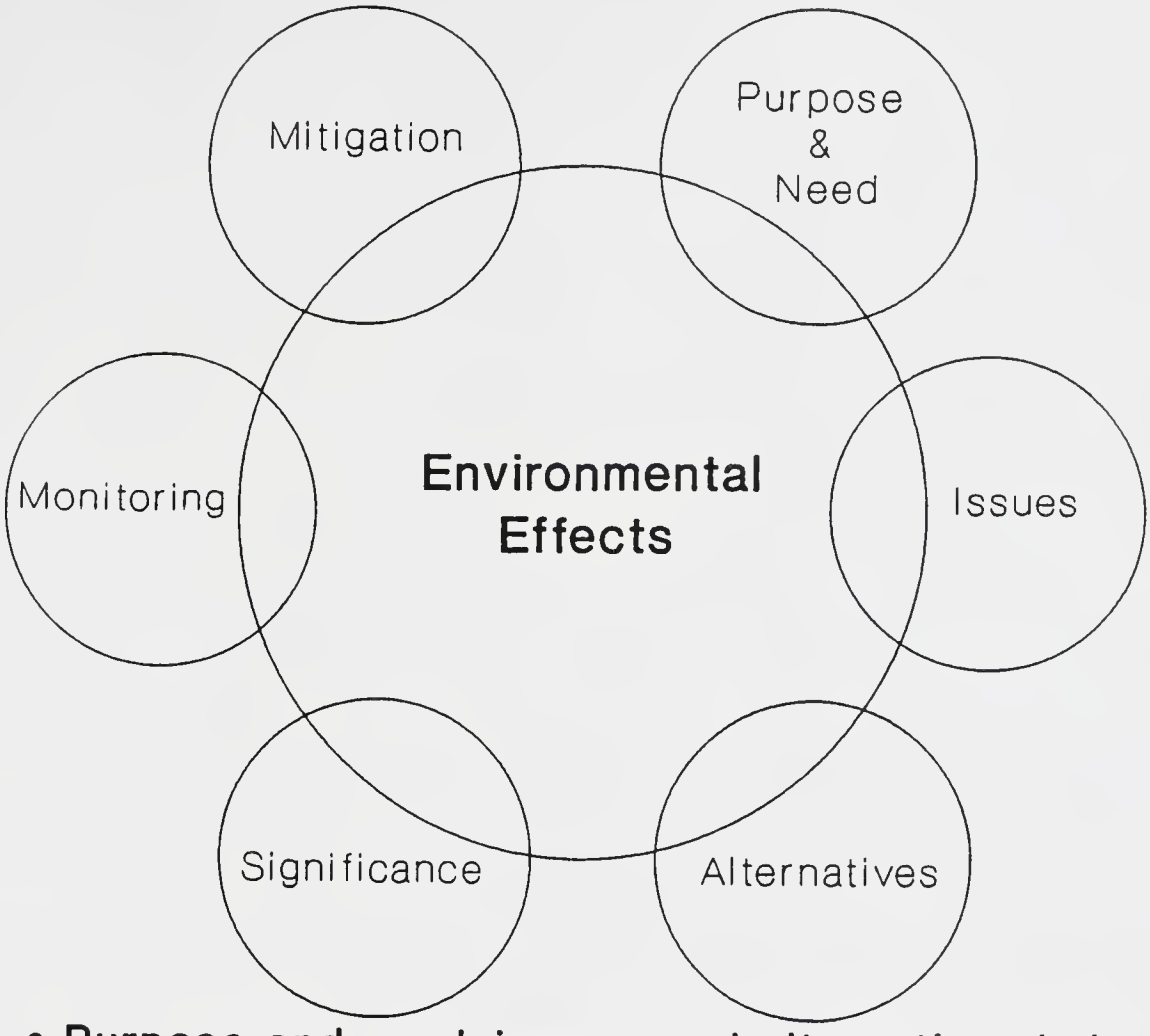
In order to adequately evaluate the impacts of an agency action you need to understand the sometimes confusing definitions of direct, secondary, and cumulative impacts. Fortunately, Gary Larson, creator of the comic strip "Farside" has thoughtfully illustrated what direct and secondary impacts might look like (see figure 33). As figure 33 illustrates, direct impacts are those occurring at the same time and place as the triggering action (e.g., construction of a 100 acre subdivision directly results in 100 acres of lost wildlife habitat).

Secondary impacts are those occurring at a later time or distance from the triggering action (e.g., 100 acre subdivision = loss of wildlife habitat which over time may result in a decline in animal populations that inhabit that area) (MEPA Model Rule II(17)).

Cumulative impact analysis is typically more complex than evaluating direct or secondary impacts. Cumulative impacts are impacts which may be negligible or minor for a specific project or action under consideration, but collectively (many similar projects or actions) or incrementally may result in significant impacts.

The MEPA Model Rules note that the concept of cumulative impacts refers to the collective impacts on the human environment of the proposed action when considered in conjunction

MEPA RELATIONSHIPS

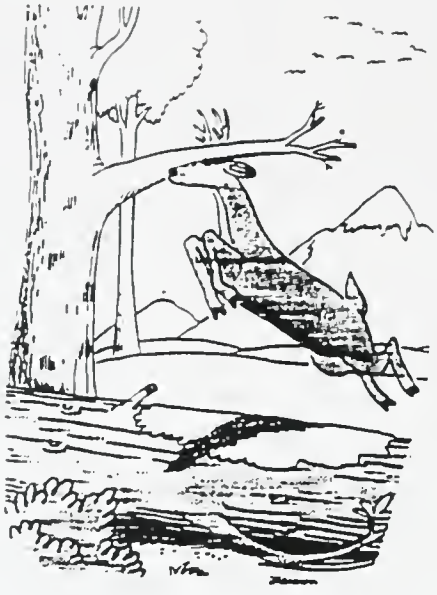


- Purpose and need, issues, and alternatives help define the scope of the environmental effects analysis.
- Monitoring and mitigation respond to the environmental effects.
- Significance of effects helps establish the level of analysis and documentation.

(Source: U.S. Forest Service, 1900-01 Training Manual)

Figure 32.

DIRECT AND SECONDARY IMPACTS



Direct impacts are those occuring at the same time and place as the triggering action.

Secondary impacts are those occurring at a later time or distance from the triggering action.

Figure 33.

Environmental Consequences/Impacts

Defining the Impacts (continued)

with other past and present actions related to the proposed action by location and generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures (MEPA Model Rule II (7)).

Cumulative impact analysis under the MEPA Model Rules requires an agency to consider all past and present state and non-state actions. For future actions an agency need only evaluate those actions under concurrent consideration by any state agency. Concurrent actions include state agency actions though pre-impact statement studies, separate impact statement evaluation or permit process procedures.

The expansiveness of cumulative impact analysis is daunting. Taken literally, the study of cumulative impacts is an analysis without any ending point. The key to effective cumulative impact analysis is to create rational boundaries--limiting your review to meaningful and realistic evaluations.

Confine your cumulative effects area in both time and space. The effects on the human environment of any action that overlaps in time and location with the effects of the project under consideration should be included in the analysis. Continue to expand your area of analysis until a trend is established showing a stable or decreasing influence from the action, or the effects from the project diminish to very low levels. When identifying the geographic boundaries of the cumulative effects analysis, look at the effects of the proposed action, rather than administrative or ownership boundaries. Make assumptions as necessary, provide your best estimate of effects, and document your rationale. If your analysis indicates that there are no cumulative impacts, document this determination.

Figure 34 illustrates the elements of cumulative impact analysis in an understandable equation format. The cumulative impact elements include:

*** past actions;**
+
*** the proposed action;**
+
*** present actions;**
+
*** related future actions under concurrent consideration by any agency.**

Figure 34 applies the cumulative impact equation to the Cutthroat Creek Example. Think how you might apply this equation to your own agency actions.

Impact Analysis

Recall that specific impacts (effects) on the human environment from the proposed action are identified and the scope delineated through the generation of the purpose and need section and the issues and alternatives sections of your document (note figure 32). The work completed on issue identification in the "Purpose and Need"

CUMULATIVE IMPACTS EQUATION

PAST ACTIONS
+
PROPOSED ACTION
+
PRESENT ACTIONS
+
RELATED FUTURE ACTIONS UNDER CONCURRENT CONSIDERATION BY ANY STATE AGENCY

=

CUMULATIVE EFFECTS

(Source: Adapted from U.S. Forest Service, 1900-01 Training Manual)

Figure 34.

CUMULATIVE IMPACTS EQUATION FOR BIG CUTTHROAT CREEK SEDIMENT LOADING

PAST ACTIONS:
-FOREST SERVICE TIMBER CUTS UPSTREAM
-CATTLE OVERGRAZING ON FOREST SERVICE AND PRIVATE LAND

+

PROPOSED ACTION:
-BUILD BRIDGE
-CLEAR TIMBER AROUND DIG SITE
-CONSTRUCT ROAD

+

PRESENT ACTIONS:
-CURRENT FOREST SERVICE TIMBER SALES
-GRAZING

+

RELATED FUTURE ACTIONS UNDER CONCURRENT CONSIDERATION BY ANY STATE AGENCY:
-FWP IS CONSIDERING BUILDING CABINS ON SITE
-DHES HAS RECEIVED AN APPLICATION FOR A SUBDIVISION APPROVAL ON AN ADJACENT PIECE OF PROPERTY

=

CUMULATIVE EFFECTS

Figure 35.

Environmental Consequences/Impacts

Impact Analysis (continued)

statement serves as a good starting point in determining what resources will be affected by the proposed action and in turn, how to reflect some measure of these effects.

For each affected resource, you must examine the cause and effect manner in which the agency's action would cause the effect(s) to occur and establish measures that can be used to interpret the effects. This should be very familiar, because you have already thought about cause and effect relationships in developing your issue statement. Cause and effect relationships provide a reference point from which you can analyze and compare impacts (effects) for each resource of concern. Figure 36 illustrates how to map a cause and effect relationship for a specific issue.

Remember that the appropriate level or depth of analysis is related to the magnitude or importance of the issues you have identified. In other words, actions which have adverse impacts of greater importance (significance) should receive more attention. This does not mean that you can ignore resource impacts that aren't significant. It's important to analyze all impacts, but the more important impacts should receive greater analysis.

MEPA analysis must include all impacts, including those that arise outside the project area. Up front in your impact analysis you must make a determination as to what are the appropriate geographical and temporal (timing) boundaries for your analysis. Again, you should already have a good grasp of the boundaries of your analysis because you have identified the location of each action and effect within your issue statement.

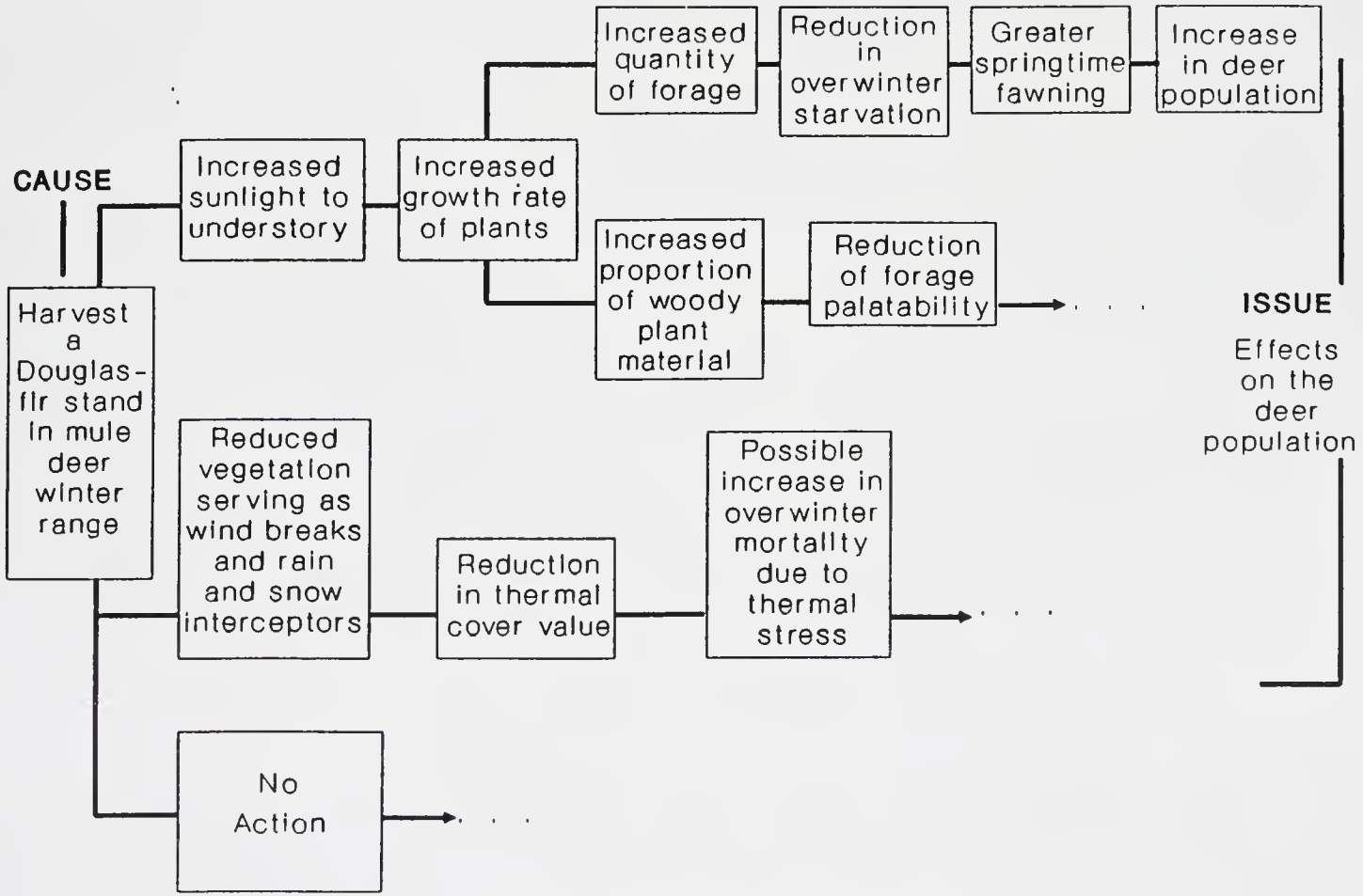
After determining the cause and effect relationships and boundaries for each affected resource, you must identify the appropriate criteria to measure the impacts. Specifically, you must match the appropriate analytical method with the effects being analyzed. There are multiple analytic tools for predicting effects. Some effects will require the use of complex analytical methods and systems, some will not. These can be quantitative, qualitative or both.

It is important that mitigation be factored into estimating environmental effects. Appropriate mitigation measures should be identified as early as possible. This will allow you to build mitigation into your cause and effect relationships. The mitigation should be realistic and result in some change in environmental effects. Even though you have identified certain mitigation measures in alternative development, your environmental effects analysis may generate the need for additional mitigation. This may cause you to revisit some of the steps discussed earlier on alternative development.

There may be situations in which there is incomplete or unavailable information that is relevant to your impact analysis. The first question that you should ask is: is this information relevant to impacts essential to a reasoned choice among alternatives? Stated differently, is this information essential for the decision-maker in order to make a reasoned and credible

Figure 36.

CAUSE AND EFFECT RELATIONSHIP FOR ONE ISSUE


CAUSE
Harvest a Douglas-fir stand in mule deer winter range
Increased sunlight to understory
Increased growth rate of plants
Increased quantity of forage
Reduction in overwinter starvation
Greater springtime fawning
Increase in deer population
Increased proportion of woody plant material
Reduction of forage palatability
Reduced vegetation serving as wind breaks and rain and snow interceptors
Reduction in thermal cover value
Possible increase in overwinter mortality due to thermal stress
No Action
ISSUE
Effects on the deer population

(Source: U.S. Forest Service, Region 1, "Our Approach to Effects Analysis")

Environmental Consequences/Impacts

Impact Analysis (continued)

choice? If the answer is no, then make clear that such information is lacking and make assumptions to fill the voids in the analysis. Be sure to identify those assumptions.

If the answer is yes, then ask yourself: Is the cost of obtaining the information excessive or are the means of obtaining it unknown? If the answer is no, then obtain the information and include it in the analysis. If the answer is yes, then you should:

*** state that such information is incomplete or unavailable;**

*** evaluate the relevance of the information to evaluating the impacts;**

*** summarize existing credible scientific evidence relevant to evaluating the adverse impacts; and**

*** document that the evaluation of such impacts is based on theoretical approaches or research methods generally accepted in the scientific community.**

(Source: U.S. Forest Service, 1900-01 Training Manual)

Once the impacts have been identified and analyzed, some level of interpretation is necessary to explain the rationale for your cause and effect relationships, and to display the effects analysis so it is understood.

Your interpretation of effects should include:

(1) the degree or direction of the effect (whether quantitative aspects of the resource will increase or decrease);

(2) the magnitude or intensity of the effect (how large a change is expected);

(3) the duration of the effect (how long will the effect continue);

(4) changes in qualitative aspects of the resource at issue; and

(5) the aspects of site specificity--effects analysis should stand on its own--if taken out of context of the environmental document, you should be able to read the effects analysis and know what specific area is being affected.

(Source: U.S. Forest Service, 1900-01 Training Manual)

Figure 37 provides some helpful hints on how to interpret impacts (effects).

The decision-maker will base decisions on impact analysis information and the interpretation of these impacts. Without such interpretation, it is difficult to make a reasoned and well informed decision.

GROUP EXERCISE #4:

Develop a cause and effect relationship for the issue identified in Handout #4.

INTERPRETING IMPACTS

1. Explain cause-effect relationships. Organize your discussions, tables, charts, etc. so the reader can easily track the effects of each alternative and how those effects relate to the issues. Reference research, publications and other MEPA documents that support the conclusions and rationale of your cause and effect relationships and effects analysis. Don't just use a scientific reference, but summarize the findings of research or the conclusions you are drawing from the reference.

2. Use a reference point. (No action alternative/Existing condition) Sometimes an effect of implementing an action can be most clearly described by showing changes in a resource component relative to the no action alternative and the existing condition. Where possible use quantitative changes from the reference point and not relative measures such as minimal, substantial, significant, etc.

3. Avoid relying on numbers exclusively. Qualitative aspects of the effects are all important. These aspects need to be supplemented by narrative descriptions to make them meaningful. They must be translated into the real physical and biological consequences. Reservations such as: "may affect", and "might alter somewhat" should be used only when supported by rationale.

4. Avoid technical jargon. Interpret effects in simple terms if at all possible. Remember, most readers are not technical specialists.

5. Use graphic displays. Graphs, diagrams, drawings, and photographs can be very useful and effective.

6. Be objective. Don't express personal opinions, or any opinions such as bad, good, or acceptable.

(Source: Adapted from U.S. Forest Service, 1900-01 Training Manual)

Figure 37.

SECTION VII
What Level of Public Review is Appropriate?

* Procedural Requirements for Public Involvement

* Benefits of, and a Strategy for, Public Participation

* Scoping Process

Procedural Requirements for Public Involvement

Introduction

This subsection will analyze the procedural requirements of public participation under MEPA and the MEPA Model Rules. Training objectives include analyzing the public involvement differences between EAs and EISs.

Public Participation: EA vs. EIS

MEPA and the MEPA Model Rules require that the public have the opportunity to be involved in the environmental review process in Montana. The MEPA Model Rules note that the appropriate level and type of public involvement for EAs will depend on:

* **the complexity of the project;**

* **the seriousness of the potential environmental impacts; and**

* **the level of public interest in the proposed action.**

(MEPA Model Rule VI)

The above factors will become familiar to you--they are almost identical to the factors used to determine what form of environmental review is appropriate--EA or EIS. The similarity between the level of public involvement and the level of environmental review is not accidental. As the significance and complexity of the impacts increase, the procedural requirements as to the level of public involvement increase.

Although almost identical in their subtantive requirements, EAs and EISs are procedurally very different. The major difference is discretion. For an EA, the agency's responsibility to provide public access to the process is largely discretionary. For an EIS, the agency is afforded little discretion (note figure 38).

Although an agency has considerable discretion as to the level of public involvement for EAs, MEPA Model Rule VI notes that:

(1) the EA is a public document and may be inspected upon request;

(2) for any mitigated EA, public involvement must include the opportunity for public comment, a public meeting or hearing, and adequate notice;

(3) the agency must consider the substantive comments received in response to an EA and, as appropriate:

* determine that an EIS is necessary;

* determine that the EA did not adequately reflect the issues raised by the proposed action and issue a revised EA;

* determine that an EIS is not necessary and make a final decision on the proposed action, with appropriate modification resulting from the analysis in the EA and analysis of public comment.

PROCEDURAL REQUIREMENTS: EA vs. EIS

Procedural Issues	EA	EIS
Is public comment required?	Discretionary (except for mitigated EAs)	Yes
Are there duration requirements for public comment?	Discretionary	Yes (30 days for the DEIS and 15 days for FEIS)
Are draft revisions required?	Discretionary	Yes (DEIS & FEIS)
Is a scoping process involving the public required?	Discretionary (note that if the agency initiates the scoping process to determine the scope of the EA the agency must follow EIS requirements for scoping)	Yes
Are the sources and text of written and oral comments required to be included in the document?	Discretionary	Yes, within the FEIS
Must the agency respond to substantive comments received?	Discretionary (note that the agency must consider comments that are received)	Yes, within the FEIS
Can the agency require the applicant or permittee to fund the environmental review process?	No	Yes, if expense >$2500 to prepare EIS

Figure 38.

Procedural Requirements for Public Involvement

Public Participation: EA vs. EIS

Additionally, the MEPA Model Rules require that if the agency chooses to initiate a process to determine the scope of an EA, the agency must follow formal EIS procedures (MEPA Model Rule V(1)).

The public's opportunity for involvement in the EIS process is mandatory. Figure 34 illustrates some of the EIS public involvement procedural requirements. For further detail note Appendices B and D.

SECTION VII - MEPA Handbook

Benefits of, and a Strategy for, Public Participation

Introduction

While the previous subsection described MEPA's legal requirements for public participation, this subsection addresses the value and benefits of public participation. It also discusses how to develop an effective public participation strategy. Training objectives include: (1) learning the philosophy behind and benefits of involving the public in the decisionmaking process; (2) understanding the principles of public participation; and 3) learning how to develop a public participation strategy.

What is Public Participation

What is public participation? Public participation is a process by which interested and affected individuals, organizations, and agencies are consulted and included in the decisionmaking of an agency. It differs from *public relations*, the goal of which is to present information in the best light possible. Nor is public participation the same thing as a *plebiscite*, which measures how many people favor versus oppose a proposal. In contrast to *public information*, which seeks only to inform the public (one-way communication), the purpose of *public participation* is to inform the public and solicit response from the public (two-way communication).

The philosophical underpinnings of public participation lie in the notion that government derives its power and legitimacy from the consent of the governed. To quote Thomas Jefferson: "I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education." In a small but direct fashion, public participation in the environmental review process represents the hopes and aspirations of a democratic republic.

Benefits of Public Participation

Remember that one of the twin objects of MEPA is to insure that the public is informed of, and participates in the decision-making process. Public involvement is not a separate component of the MEPA process. Public involvement is an integral part of each step of environmental review.

The advantages of public participation are many:

*** to insure that real problems are identified early and properly studied;**

*** to insure that issues of no concern do not consume time and energy;**

*** to broaden the information base upon which decisions are made;**

*** to identify and understand the public's concerns and values;**

And Sometimes Public Participation is Dangerous.....

"Regardless of the level of detail of agency requirements, the actual legal mandate for public involvement usually goes back to a single line in the law, which says something like: 'Citizens shall be consulted in the decision making of the agency.' The statement is hardly a model of specificity for what's expected, but that's not too surprising. When a politician sponsors a social innovation -- which formal public involvement has been -- he or she doesn't want to get caught up in a discussion of the implementation. . . it is left to the agencies to figure out what on God's earth that means.

The first people to take a stab at it -- the point men (or point persons, if you will) -- get all bloodied trying out this strange and different thing. While they are back at the ward being treated for their wounds, they begin to compare notes. Some have come back less bloody than others. The trick is to figure out whether they did something different or were just lucky.

By sharing war stories, people develop a lore about things to do or not do. Following this lore will usually get you to a semibloody state; that is, some things you should always (never) do; other things you've learned will work most of the time. But even when you follow the lore of your wisdom faithfully, sometimes you will still get bloodied. . .

Public involvement is currently in the semibloody state. There are well-known landmines that you can be directed to avoid. There is some general advice that is usually worth following. But every now and then you'll still get bloodied. This is not necessarily an indication of your inadequacy in conducting public involvement programs. Things still blow up in the faces of those of us who are the most experienced practitioners of the art."

James L. Creighton
The Public Involvement Manual, pp. vii-ix

Benefits of, and Strategy for, Public Participation

Benefits of Public Participation (continued)

*** to help make better decisions;**

*** to enhance agency credibility; and**

*** to increase the likelihood of successful implementation.**

(see figure 39).

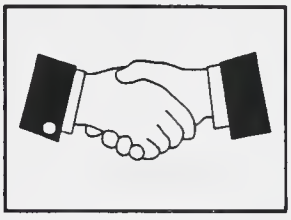
Granted, it takes considerable time and resources to involve the public, but agencies are institutions created to serve the public, and an initial public involvement investment can save significant time and expense down the road.

Principles of Public Participation

Five basic principles should guide the development of a public participation program (see figure 40):

1. **Conduct Public Involvement Early in the Environmental Review Process.** Involve the public up front during the issue identification phase of an environmental review. The MEPA process should be issue driven. By waiting until the environmental review has been completed to consult with the public, you may discover that you have failed to evaluate an issue of critical concern, or consumed time and effort on issues of no concern. Early involvement of the public does not create problems that did not already exist; it ensures that problems that would have been raised anyway are identified early in the process.

2. **Involve the Public Throughout the Environmental Review Process.** Make the MEPA process a partnership between the agency and the public. Involve the public throughout the process, especially whenever crucial decisions are made. Remember MEPA's goal of public participation. Be sure to ask the question "Is there something the public should either be informed of or comment on?" at each of the following phases of environmental review : issue identification; impact analysis; alternative identification; and decisionmaking.



3. **Obtain Input Representative of All Interested Citizens.** This may involve both a fully participatory process that seeks to involve as many interested persons as possible, as well as a representative process whereby you work intensively with a few individuals who are leaders or representatives of certain key interests that may be affected by the proposed action. It is your responsibility to identify and involve the members of the public who should be involved. If you are aware of a potentially affected individual or group who has not been involved to date, contact them and offer the

BENEFITS OF PUBLIC PARTICIPATION

* To insure that real problems are identified early and properly studied.

* To insure that issues of no concern do not consume time and energy.

* To broaden the information base upon which decisions are made.

* To identify and understand the publics concerns and values.

* To help make better decisions.

* To enhance agency credibility.

* To increase the likelihood of successful implementation.

Figure 39.

PRINCIPLES OF PUBLIC INVOLVEMENT

* Conduct public involvement early in the environmental review process.

* Involve the public throughout the environmental review process.

* Obtain input representative of all interested citizens.

* Use personal and interactive methods of public involvement.

* Demonstrate how public input was used in the environmental review.

Figure 40.

Benefits of, and Strategy for, Public Participation

Benefits of Public Participation (continued)

opportunity to participate. It is easier to address their concerns now than during the decisionmaking phase or during litigation later on.

4. **Use Personal and Interactive Methods of Public Involvement.** Don't rely solely upon nonpersonal forms of communication such as written comments and legal notices. Two-way communication provides an opportunity to build trust and confidence between you and the public, and to enhance the agency's credibility. In addition, some people may tell you things in a conversation that they would not say in writing. The desire by agency staff to avoid (or at least not fuel) public controversy is a common barrier to face-to-face interaction with the public. However, this approach may have the opposite effect, fueling controversy by increasing the amount of misinformation and presenting the perception that the agency is trying to exclude the public.

5. **Demonstrate How Public Input was Used in the Environmental Review.** If the public is to participate, they must believe that their involvement or comments will have a genuine impact on the environmental review process. The quickest way to alienate the public is to solicit their participation and then ignore their input. If you want the public to take the time to participate, then expect to take the time to respond to their comments in a documented and visible fashion. Determine how you will use the public's comments beforehand, and design a public participation strategy accordingly. This will help insure that: 1) the information you need from the public is presented to you in a form that you can use; and, 2) that members of the public clearly understand their role and harbor no false expectations.

Development of a Public Participation Strategy

A public participation strategy should be selected not on a whim, but after careful analysis of what it is you wish to accomplish, with whom, when, and only then, how. At the very beginning of the environmental review process, set aside some time to take yourself through the thought process and questions outlined in figure 41. Depending upon the particular project, you may even want to develop a written plan. Conversely, you may find that because the project's impacts are minor and lack controversy, minimal public participation is necessary. In either case, make an informed and conscious -- rather than default -- decision about an appropriate public participation strategy.

James L. Creighton (see figure 41) has identified the following steps for developing a public participation strategy:

Step 1: What is the Decisionmaking Process? To integrate public participation into the environmental review process, it is necessary to identify what decisions must be made,

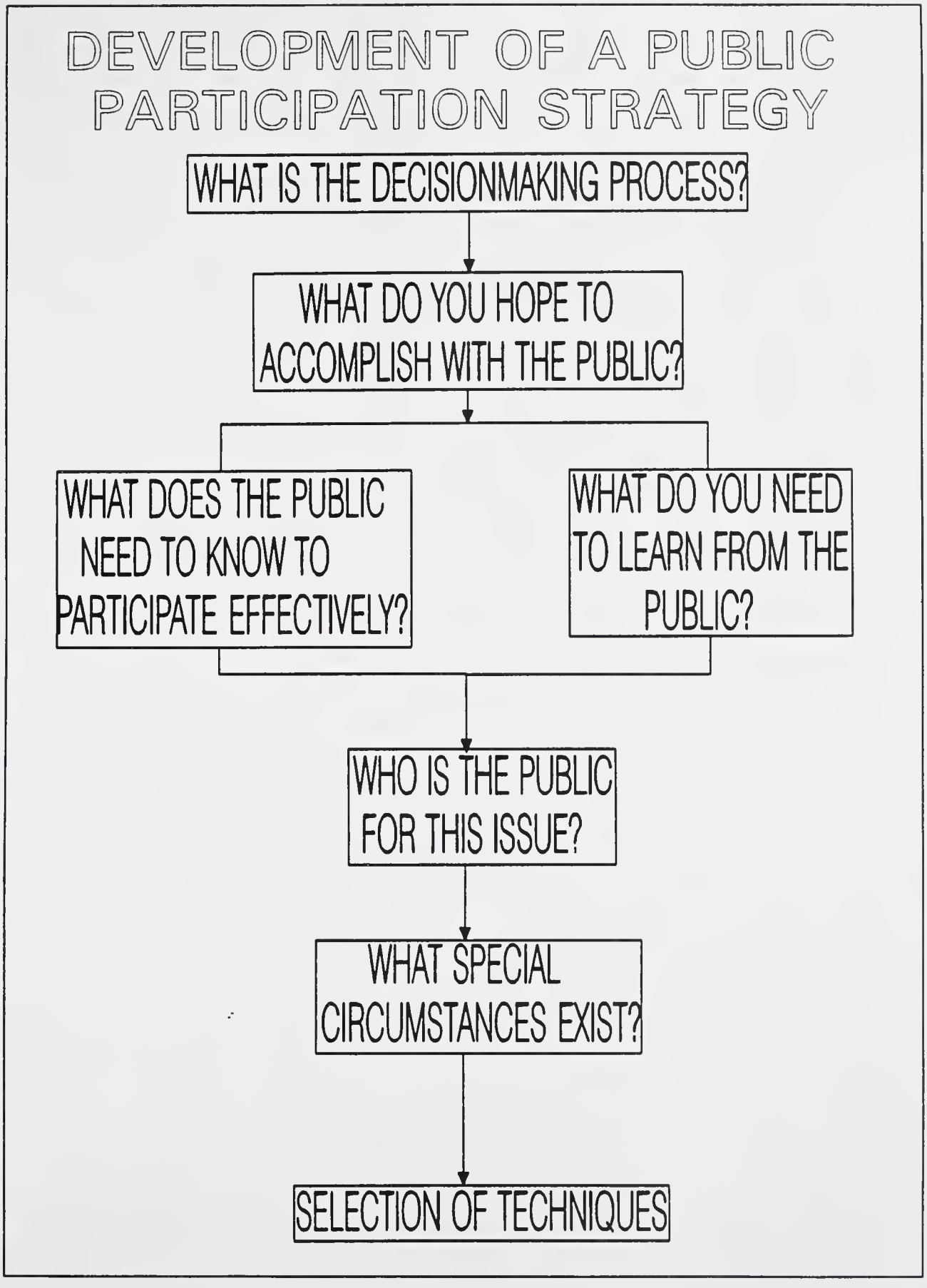

DEVELOPMENT OF A PUBLIC PARTICIPATION STRATEGY
WHAT IS THE DECISIONMAKING PROCESS?
WHAT DO YOU HOPE TO ACCOMPLISH WITH THE PUBLIC?
WHAT DOES THE PUBLIC NEED TO KNOW TO PARTICIPATE EFFECTIVELY?
WHAT DO YOU NEED TO LEARN FROM THE PUBLIC?
WHO IS THE PUBLIC FOR THIS ISSUE?
WHAT SPECIAL CIRCUMSTANCES EXIST?
SELECTION OF TECHNIQUES

Figure 41.

Benefits of, and Strategy for, Public Participation

Development of a Public Participation Strategy (continued)

who will make them, and when they must be made. Will the environmental review require major decisions on the issues analyzed? Has the development or evaluation of alternatives been considered? How about the final decision? Without first clearly defining these decision points, you will be unable to determine what information you need from the public and when you need it. The result will be a hodge-podge of information -- some too late and some too early -- that will lead to ineffective decisionmaking.

Step 2: What Do You Hope to Accomplish With The Public? The next step in the process is to define and document your public involvement objectives for each decision to be made. For example, an objective for issue identification might be to gain a complete understanding of the issues that concern all significant interests. During impact analysis the objective may be much different: to gain all of the technical expertise and information necessary to adequately analyze the impacts.

Step 3: Identify the Information Exchange Needed to Make Each Decision in the Environmental Review Process. In the previous step you identified where you want to be at each decision point. In this step you will decide what information you need from the public in order to get there. But because the public can't operate in a vacuum, you must also decide what information the public must have in order to provide you with the information you need. This means that there must be a two-way exchange of information. For each decision, specify what information you must provide to the public and the information you wish to obtain from the public.

Step 4: Identify the Members of the Public with whom Information Must be Exchanged. The purpose of this step is to target the appropriate audience for the information you seek. Keep in mind that you may not be dealing with the same members of the public during each phase of the environmental review process. A technical phase, such as impact analysis, may require dealing with experts who have the proper technical expertise (e.g., engineers and scientists). However, the issue identification or decisionmaking phases, where you are dealing with perceptions, choices, and preferences, may require a broader targeted audience.

To identify the appropriate members of the public for each decision that must be made, ask yourself: 1) Who has the information I need? 2) Who will be able to understand the information I am presenting? 3) What time commitment will be necessary for participation? 4) Whose participation is necessary to lend legitimacy to the process?

Step 5: What Special Circumstances Exist that Could Affect the Selection of a Public Involvement Technique? An environmental review does not happen in a vacuum, and it is important to consider the circumstances that surround it when selecting a public

Benefits of, and Strategy for, Public Participation

Development of a Public Participation Strategy (continued)

involvement technique. Is the proposed action controversial? What is the level of public interest? Does the issue have a prior history? Is the agency already committed to a course of action, and the purpose of public participation is simply to comply with legal requirements? Is the public informed about the issues? Does the agency have credibility with the public? Each of these special circumstances may influence your selection of one public involvement technique over another.

Step 6: Select the Appropriate Public Involvement Technique. Each of the previous steps provide a building block for making this final decision: what technique to use. Think about what you wish to accomplish through public participation, and use your creativity to devise an appropriate public involvement technique; do not just rely upon the technique that you used last time.

Howell et. al (1987) have developed a comprehensive list of public involvement techniques, and identified the advantages and disadvantages of each. This list has been reproduced as a handout entitled "A Public Participation Strategy." The handout is in the back pocket of the MEPA Handbook.

Conclusion

How much public participation is enough? There is no simple formula for answering this question; you must rely upon your own experience and professional judgement. Recognize, however, that the appropriate level of public participation may vary depending upon the level of analysis (e.g., checklist vs. EA vs. EIS) and depending upon the particular phase of environmental review (e.g., issue identification vs. decisionmaking). As a general guideline, you should take into consideration the complexity of the proposed action, the scope and uncertainty of the impacts, and the level of controversy when answering the question "how much public participation is enough?"

This section has provided some general guidelines and alternatives to consider when developing a public participation strategy. They may be helpful in some circumstances and less so in others. Not every environmental review requires a full-fledged public participation strategy; use your common sense to think through your specific situation and decide what is appropriate. Keep in mind, however, that one of the central premises of MEPA is informed decisionmaking. Without public involvement, a truly informed decision is unobtainable.

SECTION VII - MEPA Handbook

Scoping Process

Introduction

MEPA rules (Model Rule VII) provide for a formal process -- commonly referred to as "scoping" -- for determining the "scope" of an EIS. This subsection will introduce the elements of the scoping process. Training objectives include learning: 1) what the terms scope and the scoping mean; and 2) guidelines for designing a scoping process.

Scope and Scoping

The term "scope" consists of the range of actions, reasonable alternatives and impacts considered in the environmental review document (MEPA Model Rule II (17)). Figure 42 illustrates visually what the term "scope" encompasses.

Simply put, "scoping" is conducted to determine the "scope" of the proposed action and to determine what issues need to be addressed in the environmental review document. Each proposed action is unique. The proposed action will dictate the level and degree of scoping required. As the complexity, number of issues, and number of people and agencies affected increases, the scoping process must in turn be more comprehensive. While the MEPA Model Rules require scoping only for an EIS, the process can also aid the preparation of an EA.

The objectives of the scoping process are to:

* involve the affected public;

* identify potentially significant issues;

* identify issues that are not likely to involve significant impacts;

* identify existing environmental review and other related documents; and

* identify possible alternatives.

In addition, sometimes scoping enables the agency to identify serious problems with the proposed action that can be easily resolved because the proposed action is still in the development stage. This can be an added benefit of the scoping process.

An agency may use the results of the scoping process to:

* decide what interdisciplinary approach to undertake;

* identify characteristics of proposal/nature of decision;

* identify agencies involved;

* develop a public involvement strategy;

* refine issues;

* guide analysis and documentation;

* explore preliminary alternatives;

* refine project design;

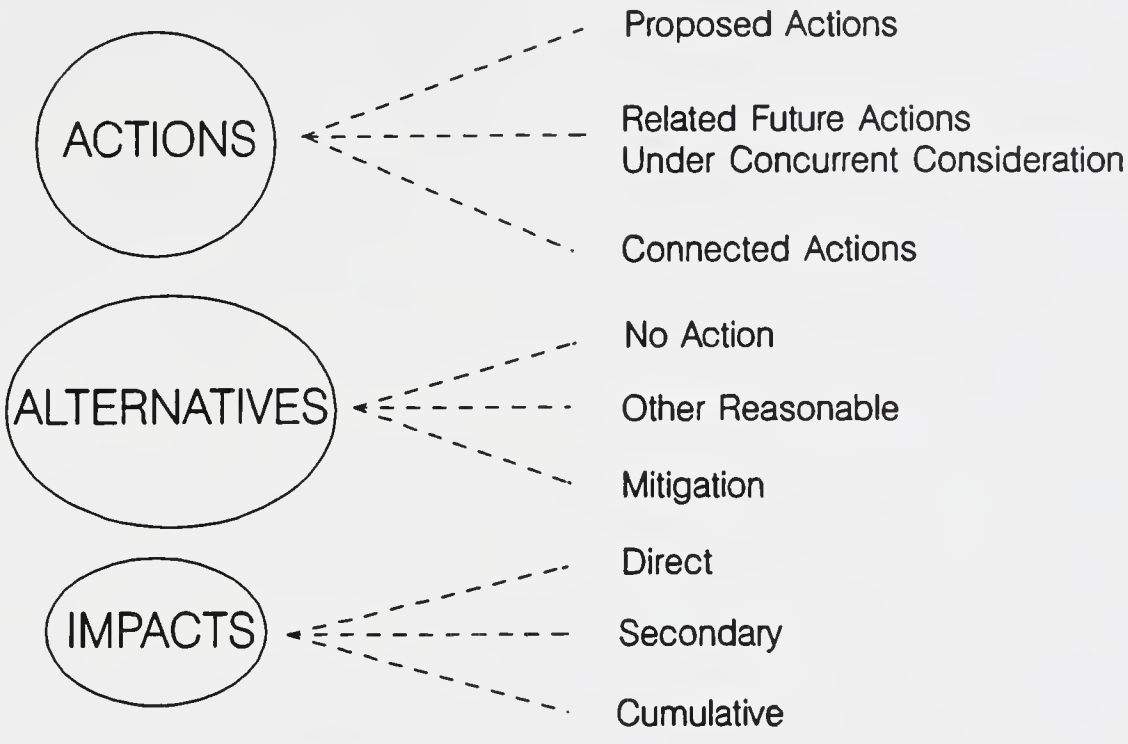
* determine data needs;

* formulate analysis/decision criteria;

* receive public reaction to the proposed action.

"SCOPE"

THE RANGE OF



TO BE CONSIDERED IN AN ENVIRONMENTAL DOCUMENT

(Source: U.S. Forest Service, 1900-01 Training Manual)

Figure 42.

Scoping Process

Steps in the Scoping Process

The Council on Environmental Quality, the federal agency responsible for coordinating the implementation of the National Environmental Policy Act (MEPA's federal counterpart), has developed a set of guidelines for the scoping process that are excerpted below. While these guidelines are not legal requirements, you may find them useful to consider when designing a scoping process.

1. Start scoping after you have enough information. Scoping cannot be useful until the agency knows enough about the proposed action to identify most of the affected parties, and to present a coherent proposal and an initial list of environmental impacts and alternatives. Until that time, there is no way to tell other agencies or the public what you want them to get involved in.

2. Prepare an information packet. Put together a brief information packet consisting of a description of the proposal, an initial list of impacts and alternatives, maps, drawings, and any other references that can help the interested public to understand what is being proposed. The purpose of this information is to enable the public to make an intelligent contribution to the scoping process. Include in the packet an explanation of what scoping is and how it will be used to provide participants a context for their involvement. Reiterate that no decision has been made, and specify topics that you would like the public to address.

3. Design the scoping process for each project. There is no established or required procedure for scoping. The process can be carried out by public meetings, small group meetings, telephone conversations, written comments, or a combination of all four. It is important to tailor the type, the timing and location of public and agency comments to the proposal at hand.

4. Issuing public notice. The preliminary look at the proposal, in which you develop the information packet mentioned above, will enable you to determine what kind of public notice will be most appropriate and effective. Remember that if you hold a public hearing, you must comply with the notice requirements contained in MEPA Model Rule XXIII.

5. What to do with comments. After you have received comments from agencies and the public, you must evaluate them and make judgements about which issues are in fact significant and which ones are not. The decision about what an environmental review should contain is the agency's responsibility. But you will now know what the interested participants consider to be the principal areas for study and analysis. You should be guided by these concerns, or prepared to explain briefly why you do not agree. Every issue that is raised as a priority matter during scoping should be addressed in some manner in the EIS, either by in-depth analysis, or at least a short explanation showing that the issue was examined, but not considered significant for one or more

Scoping Process

Steps in the Scoping Process (continued)

reasons. Be sure to utilize the significance criteria contained in MEPA Model Rule IV when making this determination. You may want to send out a post-scoping document to make public the decisions that have been made on what issues to cover in the EIS.

Scoping is tremendously valuable in directing the environmental review process. The depth of scoping activities can range from a couple of phone calls to numerous formal public meetings. Regardless of the level of scoping activity, the process itself ensures that real problems are identified early and properly studied.

SECTION VIII
How can the MEPA Document be Utilized in Agency Decision-Making?

* The Decision-Making Process and MEPA

SECTION VIII - MEPA Handbook

Decision-Making Process

Introduction

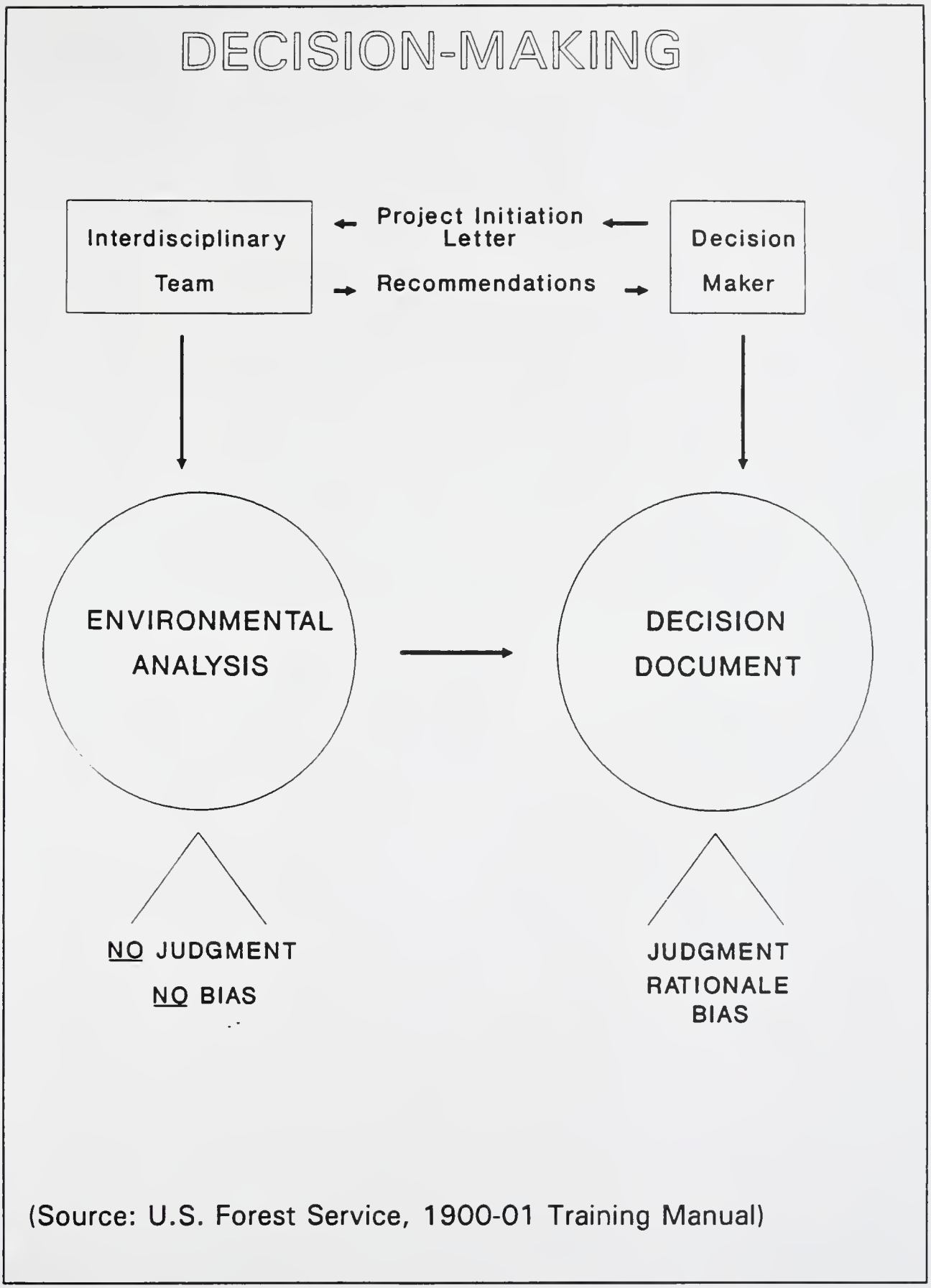
This subsection will illustrate the decision-making process as it relates to MEPA. Training objectives include defining a record of decision (ROD) and discussing how MEPA documents should be used in the decision-making process.

MEPA and Decision-Making

Neither MEPA nor the MEPA Model Rules specifically tell agencies how they should use the products of the environmental review process in their planning and decision-making. The MEPA Model Rules do require a record of decision (ROD) for actions requiring an EIS (MEPA Model Rule XVIII). An ROD is a "concise" public notice of what the decision is, the reasons for the decision, and any special conditions surrounding the decision or its implementation. In other words, the MEPA Model Rules do not require an agency to use the EIS in any specific way, only that the agency inform the public of how it actually used it. Although there is no "record of decision" requirement for EA's, it is advisable to generate some record or documentation for the decision.

One of the purposes of MEPA is to foster better and informed decisions and hopefully wise action. State agencies are required to think through their actions before acting. This process necessitates that the objective MEPA document get into the hands of a decision-maker (see figure 43). Note that the decision-making process is the place for judgment and even bias. However, the basis for that judgment must be founded at least in part in the unbiased MEPA analysis. Recall the decision-making bubble on page 18. There are many other considerations that make up the decision-making process outside of environmental factors. MEPA just requires that the decision-maker include environmental factors into her\his thought process. Nothing more and nothing less.

MEPA review is designed to be an objective information producing process. Agency Decision-makers should utilize the MEPA process as a tool to make effective and strategic decisions.



(Source: U.S. Forest Service, 1900-01 Training Manual)

Figure 43.

SECTION IX
MEPA Administrative Matters

* The Project Record

The Project Record

Introduction

This subsection will demonstrate the importance of maintaining a project record. Training objectives include: learning to construct and maintain a project record.

Project Records

There are five good reasons to document and keep track of every element of the MEPA review process:

(1) leads to reasoned decisions;

(2) maintains agency credibility;

(3) ensures defensible decisions;

(4) is legally required; and

(5) leads to better project implementation.

(Source: U.S. Forest Service, 1900-01 Training Manual)

Everything that forms the basis for the project analysis should be included in the project record (or file). Examples include communications, interdisciplinary team meeting minutes, references used, public correspondence, each version of the review process, etc. The file record can range from a simple file folder to multiple boxes.

It is helpful in maintaining a project record to index each item in terms of date received, person who prepared it, a description of what the item is, and a designated page number (see figure 44).

After a decision has been made, the project file should be closed (nothing taken and nothing added). The file is a public document and may be inspected upon request.

Maintaining a project record can be an onerous task, but a complete record is well worth the effort if an agency's decision is challenged. The project record is an administrative record subject to judicial review. The project record documents the rational for making specific environmental review decisions. If the rationale is documented it leaves little room for debate as to what was the agency's reasoning. This in turn makes the project more defensible in court.

SAMPLE FILE RECORD INDEX

PAGE	DATE	AUTHOR	SUBJECT
1	1/1/92	Smith	project meeting minutes: MEPA review determination
8	1/4/92	Smith	MEPA review draft outline
10	1/10/92	McGraw	final MEPA review outline
13	1/20/92	Johnson	project meeting minutes: discussed scoping

Figure 44.

Summary & Evaluation

SECTION X
Seminar Summary

* Seminar Synopsis

* Future MEPA Training Activities

SECTION X - MEPA Handbook

Seminar Summary & Future MEPA Training Activities

Introduction

This section will recapitulate the seminar and preview future MEPA implementation process activities.

Seminar Synopsis

You should now be able to:

(1) understand the purpose and meaning of MEPA;

(2) determine when environmental review is required under MEPA;

(3) decide what level of environmental review is appropriate for the action you are taking;

(4) conduct an environmental analysis;

(5) document (or write) that analysis;

(6) determine what level of public involvement is required or appropriate under the circumstances; and

(7) create a project record.

The MEPA training seminar was designed to provide you with a general overview of how to achieve compliance under MEPA. Hopefully, we at the EQC have increased your comfort level in applying this process. Furthermore, we hope that you view MEPA differently--as a tool to help you and your agency arrive at sound, informed and defensible decisions.

Applying the MEPA process to your daily activities means that you have complied with the law and hopefully made a better decision because of it. Make no mistake about it, there are a number of people willing to take the time and effort to ensure that your agency and other state agencies are held accountable under MEPA. So your efforts in complying with MEPA are worthwhile.

Future MEPA Training Activities

The EQC Staff will be conducting a number of future training activities. These activities include:

(1) supplementing the <u>MEPA Handbook</u> with additional appendices on:

- **MEPA/NEPA Interface**
- **MEPA: A Judicial & Executive Review**
- **MEPA: The Substantive v. Procedural Debate**
- **MEPA: Conducting Scoping Sessions**

(2) offering a MEPA Legal Workshop for agency attorneys;

(4) publishing a quarterly MEPA newsletter that briefs agency personnel on new MEPA implementation developments; and

(5) facilitating a forum to revisit MEPA implementation and the agency MEPA rules.

Seminar Summary & Future MEPA Training Activities

Future MEPA Training Activities (continued)

The EQC staff looks forward to working with you on MEPA implementation. If you have any ideas on how we can better assist you in the future, please do not hesitate to give us a call.

Appendices

APPENDIX A
The Montana Environmental Policy Act

Montana Environmental Policy Act

Part 1

General Provisions

Part Cross-References
Duty to notify weed management district when proposed project will disturb land, 7-22-2152.

75-1-101. Short title. Parts 1 through 3 may be cited as the "Montana Environmental Policy Act".
History: En. Sec. 1, Ch. 238, L. 1971; R.C.M. 1947, 69-6501.

Cross-References
State policy of consistency and continuity in the adoption and application of environmental rules, 90-1-101.

75-1-102. Purpose. The purpose of parts 1 through 3 is to declare a state policy which will encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, to enrich the understanding of ecological systems and natural resources important to the state, and to establish an environmental quality council.
History: En. Sec. 2, Ch. 238, L. 1971; R.C.M. 1947, 69-6502.

Cross-References
Right to clean and healthful environment, Art. II, sec. 3, Mont. Const.
Duty to maintain clean and healthful environment, Art. IX, sec.1, Mont. Const.
Department of Public Service Regulation, 2-15-2601.

75-1-103. Policy. (1) The legislature, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Montana, in cooperation with the federal government and local governments and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans.

(2) In order to carry out the policy set forth in parts 1 through 3, it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources to the end that the state may:

(a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) assure all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable or unintended consequences;

(d) preserve important historic, cultural, and natural aspects of our unique heritage and maintain, wherever possible, an environment that supports diversity and variety of individual choice;

(e) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(f) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

History: En. Sec. 3, Ch. 238, L. 1971; R.C.M. 1947, 69-6503.

Cross-References

Right to clean and healthful environment, Art.II, sec. 3, Mont. Const.
Duty to maintain a clean and healthful environment, Art. IX, sec.1, Mont. Const.
Comments of historic preservation officer, 22-3-433
Renewable resource development, Title 90, ch.2.

75-1-104. Specific statutory obligations unimpaired. Nothing in 75-1-103 or 75-1-201 shall in any way affect the specific statutory obligations of any agency of the state to:

(1) comply with criteria or standards of environmental quality;

(2) coordinate or consult with any other state or federal agency; or

(3) act or refrain from acting contingent upon the recommendations or certification of any other state or federal agency.

History: En. Sec. 6, Ch. 238, L. 1971; R.C.M. 1947, 69-6506.

75-1-105. Policies and goals supplementary. The policies and goals set forth in parts 1 through 3 are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state.

History: En. Sec. 7, Ch. 238, L. 1971; R.C.M. 1947, 69-6507

Part 2

Environmental Impact Statements

75-1-201. General directions - environmental impact statements.

(1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) all agencies of the state, except as provided in subsection(2), shall:

(i) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(ii) identify and develop methods and procedures which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(iii) include in every recommendation or report on proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(C) alternatives to the proposed action;

(D) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(E) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(iv) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(v) recognize the national and long-range character of environmental problems and, where consistent with the policies of the state, lend appropriate support to initiatives,resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(vi) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(vii) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(viii) assist the environmental quality council established by 5-16-101; and

(c) prior to making any detailed statement as provided in subsection (1)(b)(iii), the responsible state official shall consult with and obtain the comments of any state agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate state, federal, and local agencies which are authorized to develop and enforce environmental standards shall be made available to the governor, the environmental quality council, and the public and shall accompany the proposal through the existing agency review processes.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

(3) (a) Until the board of oil and gas conservation adopts a programmatic environmental statement, but no later than December 31, 1989, the issuance of a permit to drill a well for oil or gas is not a major action of state government as that term is used in subsection (1)(b)(iii).

(b) The board of oil and gas conservation shall adopt a programmatic statement by December 31, 1989, that must include but not be limited to:

(i) such environmental impacts as may be found to be associated with the drilling for and production of oil and gas in the major producing basins and ecosystems in Montana;

(ii) such methods of accomplishing drilling and production of oil and gas as may be found to be necessary to avoid permanent impairment of the environment or to mitigate long-term impacts so that the environment and renewable resources of the ecosystem may be returned to either conditions similar to those existing before drilling or production occurs or conditions that reflect a natural progression of environmental change;

(iii) the process that will be employed by the board of oil and gas conservation to evaluate such environmental impacts of individual drilling proposals

as may be found to exist;

(iv) an appropriate method for incorporating such environmental review as may be found to be necessary into the board's rules and drill permitting process and for accomplishing the review in an expedient manner;

(v) the maximum time periods that will be required to complete the drill permitting process, including any environmental review; and

(vi) a record of information and analysis for the board of oil and gas conservation to rely upon in responding to public and private concerns about drilling and production.

(c) The governor shall direct and have management responsibility for the preparation of the programmatic statement, including responsibility on behalf of the board of oil and gas conservation for the disbursement and expenditure of funds necessary to complete the statement. The facilities and personnel of appropriate state agencies must be used to the extent the governor deems necessary to complete the statement. The governor shall forward the completed draft programmatic statement to the board of oil and gas conservation for hearing pursuant to the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4. Following completion of a final programmatic statement, the governor shall forward the statement to the board for adoption and use in the issuance of permits to drill for oil and gas.

(d) Until the programmatic environmental statement is adopted, the board of oil and gas conservation shall prepare a written progress report after each regular meeting of the board and after any special board meeting that addresses the adoption or implementation of the programmatic environmental statement. A copy of each report must be sent to the environmental quality council.

History: En. Sec. 4, Ch. 238, L. 1971; R.C.M. 1947, 69-6504; amd. Sec. 1, Ch. 391, L. 1979; amd. Sec. 1, Ch.473, L. 1987; amd. Sec. 1, Ch. 566, L. 1989.

Compiler's Comments

1989 Amendment: In (3)(a) and (3)(b) substituted "December 31, 1989" for "June 30, 1989"; and inserted (3)(d) relating to reporting requirements concerning programmatic environmental statements not yet adopted.

Cross-References

Citizens' right to participate satisfied if environmental impact statement filed, 2-3-104.
Statement to contain information regarding heritage properties and paleontological remains, 22-3-433.
Public Service Commission, Title 69, ch. 1, part 1.
Statement under lakeshore protection provisions required, 75-7-213.
Impact statement for facility siting, 75-20-211.
Fees for impact statements concerning water permits, 85-2-124.
Energy emergency provisions -- exclusion, 90-4-310.

75-1-202. Agency rules to prescribe fees. Each agency of state government charged with the responsibility of issuing a lease, permit, contract, license, or certificate under any provision of state law may adopt rules prescribing fees which shall be paid by a person, corporation, partnership, firm, association, or other private entity when an application for a lease, permit, contract, license, or certificate will require an agency to compile an environmental impact statement as prescribed by 75-1-201. An agency must determine within 30 days after a completed application is filed whether it will be necessary to compile an environmental impact statement and assess a fee as prescribed by this part. The fee assessed under this part shall be used only to gather data and information necessary to compile an environmental impact statement as defined in parts 1 through 3. No fee may be assessed if an agency intends only to file a negative declaration stating that the proposed project will not have a significant impact on the human environment.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(1).

Cross-References
Fees authorized for environmental review of subdivision plats, 76-4-105.
Fees in connection with environmental impact statement required before issuing permits to appropriate water, 85-2-124.

75-1-203. Fee schedule -- maximums. (1) In prescribing fees to be assessed against applicants for a lease, permit, contract, license, or certificate as specified in 75-1-202, an agency may adopt a fee schedule which may be adjusted depending upon the size and complexity of the proposed project. No fee may be assessed unless the application for a lease, permit, contract, license, or certificate will result in the agency incurring expenses in excess of $2,500 to compile an environmental impact statement.

(2) The maximum fee that may be imposed by an agency shall not exceed 2% of any estimated cost up to $1 million, plus 1% of any estimated cost over $1 million and up to $20 million, plus 1/2 of 1% of any estimated cost over $20 million and up to $100 million, plus 1/4 of 1% of any estimated cost over $100 million and up to $300 million, plus 1/8 of 1% of any estimated cost in excess of $300 million.

(3) If an application consists of two or more facilities, the filing fee shall be based on the total estimated cost of the combined facilities. The estimated cost shall be determined by the agency and the applicant at the time the application is filed.

(4) Each agency shall review and revise its rules imposing fees as authorized by this part at least every 2 years. Furthermore, each agency shall provide the legislature with a complete report on the fees collected prior to the time that a request for an appropriation is made to the legislature.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(2), (7).

75-1-204. Application of administrative procedure act. In adopting rules prescribing fees as authorized by this part, an agency shall comply with the provisions of the Montana Administrative Procedure Act.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(4).

Cross-References
Montana Administrative Procedure Act -- adoption and publication of rules, Title 2, ch. 4, part 3.

75-1-205. Use of fees. All fees collected under this part shall be deposited in the state special revenue fund as provided in 17-2-102. All fees paid pursuant to this part shall be used as herein provided. Upon completion of the necessary work, each agency will make an accounting to the applicant of the funds expended and refund all unexpended funds without interest.
History: En.69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(5); amd. Sec. 1, Ch. 277, L. 1983.

75-1-206. Multiple applications or combined facility. In cases where a combined facility proposed by an applicant requires action by more than one agency or multiple applications for the same facility, the governor shall designate a lead agency to collect one fee pursuant to this part, to coordinate the preparation of information required for all environmental impact statements which may be required, and to allocate and disburse the necessary funds to the other agencies which require funds for the completion of the necessary work.
History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(6).

75-1-207. Major facility siting applications excepted. No fee as prescribed by this part may be assessed against any person, corporation, partnership, firm, association, or other private entity filing an application for a certificate under the provisions of the Montana Major Facility Siting Act, chapter 20 of this title.
History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(3).

Part 3

Environmental Quality Council

75-1-301. Definition of council. In this part "council" means the environmental quality council provided for in 5-16-101.
History: En. by Code Commissioner, 1979.

Cross-References
Qualifications, 5-16-102.
Term of membership, 5-16-103.
Officers, 5-16-105.

75-1-302. Meetings. The council may determine the time and place of its meetings but shall meet at least once each quarter. Each member of the council is entitled to receive compensation and expenses as provided in 5-2-302. Members who are full-time salaried officers or employees of this state may not be compensated for their service as

members but shall be reimbursed for their expenses.
History: En. Sec. 10, Ch. 238, L. 1971; amd. Sec. 6, Ch. 103, L. 1977; R.C.M. 1947, 69-6510.

75-1-303 through 75-1-310 reserved.

75-1-311. Examination of records of government agencies. The council shall have the authority to investigate, examine, and inspect all records, books, and files of any department, agency, commission, board, or institution of the state of Montana.
History: En. Sec. 15, Ch. 238, L. 1971; R.C.M. 1947, 69-6515.

75-1-312. Hearings -- council subpoena power -- contempt proceedings. In the discharge of its duties the council shall have authority to hold hearings, administer oaths, issue subpoenas, compel the attendance of witnesses and the production of any papers, books, accounts, documents, and testimony, and to cause depositions of witnesses to be taken in the manner prescribed by law for taking depositions in civil actions in the district court. In case of disobedience on the part of any person to comply with any subpoena issued on behalf of the council or any committee thereof or of the refusal of any witness to testify on any matters regarding which he may be lawfully interrogated, it shall be the duty of the district court of any county or the judge thereof, on application of the council, to compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such court on a refusal to testify therein.
History: En. Sec. 16, Ch. 238, L. 1971; R.C.M. 1947, 69-6516.

Cross-References
Warrant of attachment or commitment for contempt, 3-1-513.
Depositions upon oral examinations, Rules 30(a) through 30(g), 31(a) through 31(c), M.R.Civ.P. (see Title 25, ch.20).
Subpoena - disobedience, 26-2-104 through 26-2-107.
Criminal contempt, 45-7-309.

75-1-313. Consultation with other groups -- utilization of services. In exercising its powers, functions, and duties under parts 1 through 3, the council shall:

(1) consult with such representatives of science, industry, agriculture, labor, conservation organizations, educational institutions, local governments, and other groups as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations and individuals in order that duplication of effort and expense may be avoided, thus assuring that the council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.
History: En. Sec. 17, Ch. 238, L. 1971; R.C.M. 1947, 69-6517.

75-1-314 through 75-1-320 reserved.

75-1-321. Appointment and qualifications of executive director. The council shall appoint the executive director and set his salary. The executive director shall hold a degree from an accredited college or university with a major in one of the several environmental sciences and shall have at least 3 years of responsible experience in the field of environmental management. He shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the state government in the light of the policy set forth in 75-1-103; to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural needs and interests of the state; and to formulate and recommend state policies to promote the improvement of the quality of the environment.

History: En. Sec. 11, Ch. 238, L. 1971; R.C.M. 1947, 69-6511.

75-1-322. Term and removal of executive director. The executive director is solely responsible to the council. He shall hold office for a term of 2 years beginning July 1 of each odd- numbered year. The council may remove him for misfeasance, malfeasance, or nonfeasance in office at any time after notice and hearing.

History: En. Sec. 13, Ch. 238, L. 1971; R.C.M. 1947, 69-6513.

Cross-References

Notice of removal to officer authorized to replace, 2-16-503.

Official misconduct, 45-7-401.

75-1-323. Appointment of employees. The executive director, subject to the approval of the council, may appoint whatever employees are necessary to carry out the provisions of parts 1 through 3, within the limitations of legislative appropriations.

History: En. Sec.12, Ch. 238, L. 1971; R.C.M. 1947, 69-6512.

75-1-324. Duties of executive director and staff. It shall be the duty and function of the executive director and his staff to:

(1) gather timely and authoritative information concerning the conditions and trends in the quality of the environment, both current and prospective, analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering or are likely to interfere with the achievement of the policy set forth in 75-1-103, and compile and submit to the governor and the legislature studies relating to such conditions and trends;

(2) review and appraise the various programs and activities of the state agencies, in the light of the policy set forth in 75-1-103, for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy and make recommendations to the governor and the legislature with respect thereto;

(3) develop and recommend to the governor and the legislature state policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the state;

(4) conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(5) document and define changes in the natural environment, including the plant and animal systems, and accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(6) make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the legislature requests;

(7) analyze legislative proposals in clearly environmental areas and in other fields where legislation might have environmental consequences and assist in preparation of reports for use by legislative committees, administrative agencies, and the public;

(8) consult with and assist legislators who are preparing environmental legislation to clarify any deficiencies or potential conflicts with an overall ecologic plan;

(9) review and evaluate operating programs in the environmental field in the several agencies to identify actual or potential conflicts, both among such activities and with a general ecologic perspective, and suggest legislation to remedy such situations;

(10) annually, beginning July 1, 1972, transmit to the governor and the legislature and make available to the general public an environmental quality report concerning the state of the environment, which shall contain:

(a) the status and condition of the major natural, manmade, or altered environmental classes of the state, including but not limited to the air, the aquatic (including surface water and groundwater) and the terrestrial environments, including but not limited to the forest, dryland, wetland, range, urban, suburban, and rural environments;

(b) the adequacy of available natural resources for fulfilling human and economic requirements of the state in the light of expected population pressures;

(c) current and foreseeable trends in the quality, management, and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the state in the light of expected population pressures;

(d) a review of the programs and activities (including regulatory activities) of the state and local governments and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development, and utilization of natural resources; and

(e) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

History: En. Sec. 14, Ch. 238, L. 1971; R.C.M. 1947, 69-6514.

APPENDIX B
The MEPA Model Rules

In 1988, the Environmental Quality Council facilitated a re-writing of the agency MEPA administrative rules. That rule revision process produced the MEPA Model Rules. Each state agency (with a few exceptions) adopted the MEPA Model Rules through their own individual rule-making procedures. There may be some differences between the MEPA Model Rules and individual agency administrative MEPA rules. The MEPA Model Rules are included in this Appendix for informational purposes only.

DO NOT RELY ON THE MEPA MODEL RULES FOR LEGAL AUTHORITY--ALWAYS CONSULT YOUR AGENCY MEPA RULES AND SEEK ADVICE FROM YOUR AGENCY ATTORNEY.

A cross reference table between the MEPA Model Rules and the individual agency rules is provided at the end of this appendix.

"I. POLICY STATEMENT CONCERNING MEPA RULES The purpose of [these rules] is to implement Title 75, chapter 1, MCA, the Montana Environmental Policy Act (MEPA), through the establishment of administrative procedures. MEPA requires that state agencies comply with its terms "to the fullest extent possible." In order to fulfill the stated policy of that act, the agency shall conform to the following rules prior to reaching a final decision on proposed actions covered by MEPA." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"II. DEFINITIONS (1) `Action´ means a project, program or activity directly undertaken by the agency; a project or activity supported through a contract, grant, subsidy, loan or other form of funding assistance from the agency, either singly or in combination with one or more other state agencies; or a project or activity involving the issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency, either singly or in combination with other state agencies.

(2)(a) `Alternative´ means:

(i) an alternate approach or course of action that would appreciably accomplish the same objectives or results as the proposed action;

(ii) design parameters, mitigation, or controls other than those incorporated into a proposed action by an applicant or by an agency prior to preparation of an EA or draft EIS;

(iii) no action or denial; and

(iv) for agency-initiated actions, a different program or series of activities that would accomplish other objectives or a different use of resources than the proposed program or series of activities.

(b) The agency is required to consider only alternatives that are realistic, technologically available, and that represent a course of action that bears a logical relationship to the proposal being evaluated.

(3) `The agency´ means [agency adopting rules].

(4) `Applicant´ means a person or any other entity who applies to the agency for a grant, loan, subsidy, or other funding assistance, or for a lease, permit, license, certificate, or other entitlement for use or permission to act.

(5) `Categorical exclusion´ refers to a type of action which does not individually, collectively, or cumulatively require an EA or EIS, as determined by rulemaking or programmatic review adopted by the agency, unless extraordinary circumstances, as defined by rulemaking or programmatic review, occur.

(6) `Compensation´ means the replacement or provision of substitute resources or environments to offset an impact on the quality of the human environment. The agency may not consider compensation for purposes of determining the significance of impacts (see Rule III(4)).

(7) `Cumulative impact´ means the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures.

(8) `Emergency actions´ include, but are not limited to:

(a) projects undertaken, carried out, or approved by the agency to repair or restore property or facilities damaged or destroyed as a result of a disaster when a disaster has been declared by the governor or other appropriate government entity;

(b) emergency repairs to public service facilities necessary to maintain service; and

(c) projects, whether public or private, undertaken to prevent or mitigate immediate threats to public health, safety, welfare, or the environment.

(9) `Environmental assessment´ (EA) means a written analysis of a proposed action to determine whether an EIS is required or to serve one or more of the other purposes described in Rule III(2).

(10) `Environmental impact statement´ (EIS) means the detailed written statement required by section 75-1-201, MCA, which may take several forms:

(a) "Draft environmental impact statement" means a detailed written statement prepared to the fullest extent possible in accordance with 75-1-201(1)(b)(iii), MCA, and;

(b) "Final environmental impact statement" means a written statement prepared to the fullest extent possible in accordance with 75-1-201, MCA, and Rule X or XI and which responds to substantive comments received on the draft environmental impact statement;

(c) "Joint environmental impact statement" means an EIS prepared jointly by more than one agency, either state or federal, when the agencies are involved in the same or a closely related proposed action.

(11) `Environmental quality council´ (EQC) means the council established

pursuant to Title 75, chapter 1, MCA, and 5-16-101, MCA.

(12) `Human environment´ includes, but is not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment. As the term applies to the agency's determination of whether an EIS is

necessary (see Rule III(1)), economic and social impacts do not by themselves require an EIS. However, whenever an EIS is prepared, economic and social impacts and their relationship to biological, physical, cultural and aesthetic impacts must be discussed.

(13) `Lead agency´ means the state agency that has primary authority for committing the government to a course of action or the agency designated by the governor to supervise the preparation of a joint environmental impact statement or environmental assessment.

(14) `Mitigation´ means:

(a) avoiding an impact by not taking a certain action or parts of an action;

(b) minimizing impacts by limiting the degree or magnitude of an action and its implementation;

(c) rectifying an impact by repairing, rehabilitating, or restoring the affected environment; or

(d) reducing or eliminating an impact over time by preservation and maintenance operations during the life of an action or the time period thereafter that an impact continues.

(15) `Programmatic review´ means an analysis (EIS or EA) of the impacts on the quality of the human environment of related actions, programs, or policies.

(16) `Residual impact´ means an impact that is not eliminated by mitigation.

(17) `Scope´ means the range of reasonable alternatives, mitigation, issues, and potential impacts to be considered in an environmental assessment or an environmental impact statement.

(18) `Secondary impact´ means a further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action.

(19) `State agency´, means an office, commission, committee, board, department, council, division, bureau, or section of the executive branch of state government." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"III. GENERAL REQUIREMENTS OF THE ENVIRONMENTAL REVIEW PROCESS

Section 75-1-201 requires state agencies to integrate use of the natural and social sciences and the environmental design arts in planning and in decision-making, and to prepare a detailed statement (an EIS) on each proposal for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment. In order to determine the level of environmental review for each proposed action that is necessary to comply with 75-1-201, MCA, the agency shall apply the following criteria:

(1) The agency shall prepare an EIS as follows:

(a) whatever an EA indicates that an EIS is necessary; or

(b) whenever, based on the criteria in Rule IV, the proposed action is a major action of state government significantly affecting the quality of the human environment.

(2) An EA may serve any of the following purposes:

(a) to ensure that the agency uses the natural and social sciences and the environmental design arts in planning and decision making. An EA may be used independently or in conjunction with other agency planning and decision-making procedures;

(b) to assist in the evaluation of reasonable alternatives and the development of conditions, stipulations or modifications to be made a part of a proposed action;

(c) to determine the need to prepare an EIS through an initial evaluation and determination of the significance of impacts associated with a proposed action;

(d) to ensure the fullest appropriate opportunity for public review and comment on proposed actions, including alternatives and planned mitigation, where the residual impacts do not warrant the preparation of an EIS; and

(e) to examine and document the effects of a proposed action on the quality of the human environment, and to provide the basis for public review and comment,

whenever statutory requirements do not allow sufficient time for an agency to prepare an EIS. The agency shall determine whether sufficient time is available to prepare an EIS by comparing statutory requirements that establish when the agency must make its decision on the proposed action with the time required by Rule XII to obtain public review of an EIS plus a reasonable period to prepare a draft EIS and, if required, final EIS.

(3) The agency shall prepare an EA whenever:

(a) the action is not excluded under (5) and it is not clear without preparation of an EA whether the proposed action is a major one significantly affecting the quality of the human environment;

(b) the action is not excluded under (5) and although an EIS is not warranted, the agency has not otherwise implemented the interdisciplinary analysis and public review purposes listed in (2)(a) and (d) through a similar planning and decision-making process; or

(c) statutory requirements do not allow sufficient time for the agency to prepare an EIS.

(4) The agency may, as an alternative to preparing an EIS, prepare an EA whenever the action is one that might normally require an EIS, but effects which might otherwise be deemed significant appear to be mitigable below the level of significance through design, or enforceable controls or stipulations or both imposed by the agency or other government agencies. For an EA to suffice in this instance, the agency must determine that all of the impacts of the proposed action have been accurately identified, that they will be mitigated below the level of significance, and that no significant impact is likely to occur. The agency may not consider compensation for purposes of determining that impacts have been mitigated below the level of significance.

(5) The agency is not required to prepare an EA or an EIS for the following categories of action:

(a) actions that qualify for a categorical exclusion as defined by rule or justified by a programmatic review. In the rule or programmatic review, the agency shall identify any extraordinary circumstances in which a normally excluded action requires an EA or EIS;

(b) administrative actions: routine, clerical or similar functions of a department, including but not limited to administrative procurement, contracts for consulting services, and personnel actions;

(c) minor repairs, operations, or maintenance of existing equipment or facilities;

(d) investigation and enforcement: data collection, inspection of facilities or enforcement of environmental standards;

(e) ministerial actions: actions in which the agency exercises no discretion, but rather acts upon a given state of facts in a prescribed manner; and

(f) actions that are primarily social or economic in nature and that do not otherwise affect the human environment." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"**IV. DETERMINING THE SIGNIFICANCE OF IMPACTS** (1) In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS and also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment:

(a) the severity, duration, geographic extent, and frequency of occurrence of the impact;

(b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;

(c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;

(d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;

(e) the importance to the state and to society of each environmental resource or value that would be affected;

(f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and

(g) potential conflict with local, state, or federal laws, requirements, or formal plans.

(2) An impact may be adverse, beneficial, or both. If none of the adverse effects of the impact are significant, an EIS is not required. An EIS is required if an impact has a significant adverse effect, even if the agency believes that the effect on balance will be beneficial." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP:, Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"**V. PREPARATION AND CONTENTS OF ENVIRONMENTAL ASSESSMENTS** (1) The agency shall prepare an EA, regardless of its length or the depth of analysis, in a manner which utilizes an interdisciplinary approach. The agency may initiate a process to determine the scope of issues to be addressed in an EA. Whenever the agency

elects to initiate this process, it shall follow the procedures contained in ARM 26.2.647.

(2) For a routine action with limited environmental impact, the contents of an EA may be reflected on a standard checklist format. At the other extreme, whenever an action is one that might normally required an EIS, but effects that otherwise might be deemed significant are mitigated in project design or by controls imposed by the agency, the analysis, format, and content must all be more substantial. The agency shall prepare the evaluations and present the information described in section (3) as applicable and in a level of detail appropriate to the following considerations:

(a) the complexity of the proposed action;

(b) the environmental sensitivity of the area affected by the proposed action;

(c) the degree of uncertainty that the proposed action will have a significant impact on the quality of the human environment;

(d) the need for and complexity of mitigation required to avoid the presence of significant impacts.

(3) To the degree required in (2) above, an EA must include:

(a) a description of the proposed action, including maps and graphs;

(b) a description of the benefits and purpose of the proposed action. If the agency prepares a cost/benefit analysis before completion of the EA, the EA must contain the cost/benefit analysis or a reference to it;

(c) a listing of any state, local, or federal agencies that have overlapping or additional jurisdiction or environmental review responsibility for the proposed action and the permits, licenses, and other authorizations required;

(d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing more detailed analysis of topics and impacts that are potentially significant, including, where appropriate: terrestrial and aquatic life and habitats; water quality, quantity, and distribution; geology; soil quality, stability, and moisture; vegetation cover, quantity and quality; aesthetics; air quality; unique, endangered, fragile, or limited environmental resources; historical and archaeological sites; and demands on environmental resources of land, water, air and energy;

(e) an evaluation of the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing more detailed analysis of topics and impacts that are potentially significant, including where appropriate, social structures and mores; cultural uniqueness and diversity; access to and quality of recreational and wilderness activities; local and state tax base and tax revenues; agricultural or industrial production; human health; quantity and distribution of employment; distribution and density of population and housing; demands for government services; industrial and commercial activity; locally adopted environmental plans and goals; and other appropriate social and economic circumstances;

(f) a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion

of how the alternative would be implemented;

(g) a listing and appropriate evaluation of mitigation, stipulations, and other controls enforceable by the agency or another government agency;

(h) a listing of other agencies or groups that have been contacted or have contributed information;

(i) the names of persons responsible for preparation of the EA; and

(j) a finding on the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not required, the EA must describe the reasons the EA is an appropriate level of analysis." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"**VI. PUBLIC REVIEW OF ENVIRONMENTAL ASSESSMENTS** (1) The level of analysis in an EA will vary with the complexity and seriousness of environmental issues associated with a proposed action. The level of public interest will also vary. The agency is responsible for adjusting public review to match these factors.

(2) An EA is a public document and may be inspected upon request. Any person may obtain a copy of an EA by making a request to the agency. If the document is out-of-print, a copying charge may be levied.

(3) The agency is responsible for providing additional opportunities for public review consistent with the seriousness and complexity of the environmental issues associated with a proposed action and the level of public interest. Methods of accomplishing public review include publishing a news release or legal notice to announce the availability of an EA, summarizing its content and soliciting public comment; holding public meetings or hearings; maintaining mailing lists of persons interested in a particular action or type of action and notifying them of the availability of EAs on such actions; and distributing copies of EAs for review and comment.

(4) For an action with limited environmental impact and little public interest, no further public review may be warranted. However, where an action is one that normally requires an EIS, but effects that otherwise might be deemed significant are mitigated in the project proposal or by controls imposed by the agency, public involvement must include the opportunity for public comment, a public meeting or hearing, and adequate notice. The agency is responsible for determining appropriate methods to ensure adequate notice. The agency is responsible for determining appropriate methods to
ensure adequate public review on a case by case basis.

(5) The agency shall maintain a log of all Eas completed by the agency and shall submit a list of any new EAs completed to the office of the governor and the environmental quality council on a quarterly basis. In addition, the agency shall submit a copy of each completed EA to the EQC.

(6) The agency shall consider the substantive comments received in response to an EA and proceed in accordance with one of the following steps, as appropriate:

(a) determine that an EIS is necessary;

(b) determine that the EA did not adequately reflect the issues raised by the proposed action and issue a revised document; or

(c) determine that an EIS is not necessary and make a final decision on the

proposed action, with appropriate modification resulting from the analysis in the EA and analysis of public comment." (History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)

"VII. DETERMINING THE SCOPE OF AN EIS (1) Prior to the preparation of an EIS, the agency shall initiate a process to determine the scope of the EIS.

(2) To identify the scope of an EIS, the agency shall:

(a) invite the participation of affected federal, state, and local government agencies, Indian tribes, the applicant, if any, and interested persons or groups;

(b) identify the issues related to the proposed action that are likely to involve significant impacts and that will be analyzed in depth in the EIS;

(c) identify the issues that are not likely to involve significant impacts, thereby indicating that unless unanticipated effects are discovered during the preparation of the EIS, the discussion of these issues in the EIS will be limited to a brief presentation of the reasons they will not significantly affect the quality of the human environment; and

(d) identify those issues that have been adequately addressed by prior environmental review, thereby indicating that the discussion of these issues in the EIS will be limited to a summary and reference to their coverage elsewhere; and

(e) identify possible alternatives to be considered." (History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)

"VIII. ENVIRONMENTAL IMPACT STATEMENTS--GENERAL REQUIREMENTS The following apply to the design and preparation of EISs:

(1) The agency shall prepare EISs that are analytic rather than encyclopedic.

(2) The agency shall discuss the impacts of a proposed action in a level of detail that is proportionate to their significance. For other than significant issues, an EIS need only include enough discussion to show why more study is not warranted.

(3) The agency shall prepare with each draft and final EIS a brief summary that is available for distribution separate from the EIS. The summary must describe:

(a) the proposed action being evaluated by the EIS, the impacts, and the alternatives;

(b) areas of controversy and major conclusions;

(c) the tradeoffs among the alternatives; and

(d) the agency's preferred alternative, if any." (History: Sec. 2-3-103, 2-4-201 MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)

"IX. PREPARATION AND CONTENTS OF DRAFT ENVIRONMENTAL IMPACT STATEMENTS If required by these rules, the agency shall prepare a draft environmental impact statement using an interdisciplinary approach and containing the following:

(1) a description of the proposed action, including its purpose and benefits;

(2) a listing of any state, local, or federal agencies that have overlapped or additional jurisdiction and a description of their responsibility for the proposed action;

(3) a description of the current environmental conditions in the area affected by the proposed action or alternatives, including maps and charts, whenever appropriate.

The description must be no longer than is necessary to understand the effects of the action and alternatives. Data analysis must be commensurate with the importance of the impact with less important material summarized, consolidated, or simply reference;

(4) a description of the impacts on the quality of the human environment of the proposed action included:

(a) the factors listed in (3)(d) and (e) of Rule V, whenever appropriate;

(b) primary, secondary, and cumulative impacts;

(c) potential growth-inducing or growth-inhibiting impacts;

(d) irreversible and irretrievable commitments of environmental resources, including land, air, water and energy;

(e) economic and environmental benefits and costs of the proposed action; and

(f) the relationship between local short-term uses of man's environmental and the effect on maintenance and enhancement of the long-term productivity of the environment. Where a cost-benefit analysis is prepared by the agency prior to the preparation of the draft EIS, it shall be incorporated by reference in or appended to the EIS;

(5) an analysis of reasonable alternatives to the proposed action, including the alternative of no action and other reasonable alternatives that may or may not be within the jurisdiction of the agency to implement, if any;

(6) a discussion of mitigation, stipulations, or other controls committed to and enforceable by the agency or other government agency;

(7) a discussion of any compensation related to impacts stemming from the proposed action;

(8) an explanation of the tradeoffs among the reasonable alternatives;

(9) the agency's preferred alternative, if any, and its reasons for the preference;

(10) a section on consultation and preparation of the draft EIS that includes the following:

(a) the names of those individuals or groups responsible for preparing the EIS;

(b) a listing of other agencies, groups, or individuals who were contacted or contributed information; and

(c) a summary list of source materials used in the preparation of the draft EIS;

(11) a summary of the draft EIS as required in Rule VIII; and

(12) other sections that may be required by other statutes in a comprehensive evaluation of the proposed action, or by the National Environmental Policy Act or other federal statutes governing a cooperating federal agency." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"**X. ADOPTION OF DRAFT ENVIRONMENTAL IMPACT STATEMENT AS FINAL** (1) Depending upon the substantive comments received in response to the draft EIS, the draft statement may suffice. The agency shall determine whether to adopt the draft EIS within 30 days of the close of the comment period on the draft EIS.

(2) In the event the agency determines to adopt the draft EIS, the agency shall notify the governor, the environmental quality council, the applicant, if any, and all commenters of its decision and provide a statement describing its proposed course of action. This notification must be accompanied by a copy of all comments or a

summary of a representative sample of comments received in response to the draft statement, together with, at minimum, an explanation of why the issues raised do not warrant the preparation of a final EIS.

(3) The agency shall provide public notice of its decision to adopt the draft EIS as a final EIS.

(4) If the agency decides to adopt the draft EIS as the final EIS, it may make a final decision on the proposed action no sooner than 15 days after complying with subsections (1) through (3) above." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"**XI. PREPARATION AND CONTENTS OF FINAL ENVIRONMENTAL IMPACT STATEMENT** Except as provided in Rule X, a final environmental impact statement must include:

(1) a summary of major conclusions and supporting information from the draft EIS and the responses to substantive comments received on the draft EIS, stating specifically where such conclusions and information were changed from those which appeared in the draft;

(2) a list of all sources of written and oral comments on the draft EIS, including those obtained at public hearings, and, unless impractical, the text of comments received by the agency (in all cases, a representative sample of comments must be included);

(3) the agency's responses to substantive comments, including an evaluation of the comments received and disposition of the issues involved.;

(4) data, information, and explanations obtained subsequent to circulation of the draft; and

(5) the agency's recommendation, preferred alternative, or proposed decision together with an explanation of the reasons therefor." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"**XII. TIME LIMITS AND DISTRIBUTION OF ENVIRONMENTAL IMPACT STATEMENTS** (1) Following preparation of a draft EIS, the agency shall distribute copies to the governor, EQC, appropriate state and federal agencies, the applicant, if any, and persons who have requested copies.

(2) The listed transmittal date to the governor and the EQC must not be earlier than the date that the draft EIS is mailed to other agencies, organizations, and individuals. The agency shall allow 30 days for reply, provided that the agency may extend this period up to an additional 30 days at its discretion or upon application of any person for good cause. When preparing a joint EIS with a federal agency or agencies, the agency may also extend this period in accordance with time periods specified in regulations that implement the National Environmental Policy Act. However, no extension which is otherwise prohibited by law may be granted.

(3) In cases involving an applicant, after the period for comment on the draft EIS has expired, the agency shall send to the applicant a copy of all written comments that were received. The agency shall advise the applicant that he has a reasonable time to respond in writing to the comments received by the agency on the draft EIS and

that the applicant's written response must be received before a final EIS can be prepared and circulated. The applicant may waive his right to respond to the comments on the draft EIS.

(4) Following preparation of a final EIS, the Agency shall distribute copies to the governor, EQC, appropriate state and federal agencies, the applicant, if any, persons who submitted comments on or received a copy of the draft EIS, and other members of the public upon request.

(5) Except as provided by Rule X(4), a final decision must not be made on the proposed action being evaluated in a final EIS until 15 days have expired from the date of transmittal of the final EIS to the governor and EQC. The listed transmittal date to the governor and EQC must not be earlier than the date that the final EIS is mailed to other agencies, organizations, and individuals.

(6) All written comments received on an EIS, including written responses received from the applicant, must be made available to the public upon request.

(7) Until the agency reaches its final decision on the proposed action, no action concerning the proposal may be taken that would:

(a) have an adverse environmental impact; or

(b) limit the choice of reasonable alternatives, including the no-action alternative."

(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)

"**XIII. SUPPLEMENTS TO ENVIRONMENTAL IMPACT STATEMENTS** (1) The agency shall prepare supplements to either draft or final environmental impact statements whenever:

(a) the agency or the applicant makes a substantial change in a proposed action;

(b) there are significant new circumstances, discovered prior to final agency decision, including information bearing on the proposed action or its impacts that change the basis for the decision; or

(c) following preparation of a draft EIS and prior to completion of a final EIS, the agency determines that there is a need for substantial, additional information to evaluate the impacts of a proposed action or reasonable alternatives.

(2) A supplement must include, but is not limited to, a description of the following:

(a) an explanation of the need for the supplement;

(b) the proposed action; and

(c) any impacts, alternatives of other items required by Rule IX for a draft EIS or Rule XI for a final EIS that were either not covered in the original statement or that must be revised based on new information or circumstances concerning the proposed action.

(3) The same time periods applicable to draft and final EISs apply to the circulation and review of supplements." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XIV. ADOPTION OF AN EXISTING EIS (1) The agency shall adopt as part of a draft EIS all or any part of the information, conclusions, comments, and responses to comments contained in an existing EIS that has been previously or is being concurrently prepared pursuant to MEPA or the National Environmental Policy Act if the agency determines:

(a) that the existing EIS covers an action paralleling or closely related to the action proposed by the agency or the applicant;

(b) on the basis of its own independent evaluation, that the information contained in the existing EIS has been accurately presented; and

(c) that the information contained in the existing EIS is applicable to the action currently being considered.

(2) A summary of the existing EIS or the portion adopted and a list of places where the full text is available must be circulated as a part of the EIS and treated as part of the EIS for all purposes, including, if required, preparation of a final EIS.

(3) Adoption of all or part of an existing EIS does not relieve the agency of the duty to comply with ARM 26.2.649.

(4) The same time periods applicable to draft and final EISs apply to the circulation and review of EISs that include material adopted from an existing EIS.

(5) The agency shall take full responsibility for the portions of a previous EIS adopted. If the agency disagrees with certain adopted portions of the previous EIS, it shall specifically discuss the points of disagreement.

(6) No material may be adopted unless it is reasonably available for inspection by interested persons within the time allowed for comment.

(7) Whenever part of an existing EIS or concurrently prepared EIS is adopted, the part adopted must include sufficient material to allow the part adopted to be considered in the context in which it was presented in the original EIS." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XV. INTERAGENCY COOPERATION (1) Whenever it is the lead agency responsible for preparation of an EIS, the agency may:

(a) request the participation of other governmental agencies which have special expertise in areas that should be addressed in the EIS;

(b) allocate assignments, as appropriate, for the preparation of the EIS among other participating agencies; and

(c) coordinate the efforts of all affected agencies.

(2) Whenever participation of the agency is requested by a lead agency, the agency shall make a good-faith effort to participate in the EIS as requested, with its expenses for participation in the EIS paid by the lead agency or other agency collecting the EIS fee if one is collected." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XVI. JOINT ENVIRONMENTAL IMPACT STATEMENTS AND EA'S (1) Whenever the agency and one or more other state agencies have jurisdiction over an applicant's proposal or major state actions that individually, collectively, or cumulatively require an EIS and another agency is clearly the lead agency, the agency shall cooperate with the

lead agency in the preparation of a joint EIS. Whenever it is clearly the lead agency, the agency shall coordinate the preparation of the EIS as required by this rule. Whenever the agency and one or more agencies have jurisdiction over an applicant's proposal or major state actions and lead agency status cannot be resolved, the agency shall request a determination from the governor.

(2) The agency shall cooperate with federal and local agencies in preparing EISs when the jurisdiction of the agency is involved. This cooperation may include, but is not limited to: joint environmental research studies, a joint process to determine the scope of an EIS, joint public hearings, joint EISs, and whenever appropriate, joint issuance of a record of decision.

(3) Whenever the agency proposes or participates in an action that requires preparation of an EIS under both the National Environmental Policy Act and MEPA, the EIS must be prepared in compliance with both statutes and associated rules and regulations. The agency may, if required by the cooperating federal agency, accede to and follow more stringent requirements, such as additional content or public review periods, but in no case may it accede to less than is provided for in these rules.

(4) The same general provisions for cooperation and joint issuance of documents provided for in this rule in connection with EISs also apply to EAs." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"**XVII. PREPARATION, CONTENT, AND DISTRIBUTION OF A PROGRAMMATIC REVIEW** (1) Whenever the agency is contemplating a series of agency-initiated action, programs, or policies which in part or in total may constitute a major state action significantly affecting the human environment, it shall prepare a programmatic review discussing the impacts of the series of actions.

(2) The agency may also prepare a programmatic review whenever required by statute, whenever a series of actions under the jurisdiction of the agency warrant such an analysis as determined by the agency, or whenever prepared as a joint effort with a federal agency requiring a programmatic review.

(3) The agency shall determine whether the programmatic review takes the form of an EA or an EIS in accordance with the provisions of Rule III and IV, unless otherwise provided by statute.

(4) A programmatic review must include, as a minimum, a concise, analytical discussion of alternatives and the cumulative environmental effects of these alternatives on the human environment. In addition programmatic reviews must contain the information specified in Rule IX for EISs or Rule V for EAs, as applicable.

(5) The agency shall adhere to the time limits specified for distribution and public comment on EISs or EAs, whichever is applicable.

(6) While work on a programmatic review is in progress, the agency may not take major state actions covered by the program in that interim period unless such action:

(a) is part of an ongoing program;

(b) is justified independently of the program; or

(c) will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program if it tends to determine subsequent

development or foreclose reasonable alternatives.

(7) Actions taken under subsection (6) must be accompanied by an EA or an EIS, if required." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"**XVIII RECORD OF DECISION FOR ACTIONS REQUIRING ENVIRONMENTAL IMPACT STATEMENTS** (1) At the time of its decision concerning a proposed action for which an EIS was prepared, the agency shall prepare a concise public record of decision. The record, which may be integrated into any other documentation of the decision that is prepared by the agency, is a public notice of what the decision is, the reasons for the decision, and any special conditions surrounding the decision or its implementation.

(2) The agency may include in the final EIS, in addition to a statement of its proposed decision, preferred alternative, or recommendation on the proposed action, the other items required by (1), and additional explanation as provided for in (3) below. If the final decision and the reasons for that final decision are the same as set forth in the final EIS, the agency may comply with (1) by preparing a public notice of what the decision is and adopting by reference the information contained in the final EIS that addresses the items required by (1). If the final decision or any of the items required by (1) are different from what was presented in the final EIS, the agency is responsible for preparing a separate record of decision.

(3) There is no prescribed format for a record of decision, except that it must include the items listed in (1). The record may include the following items as appropriate:

(a) brief description of the context of the decision;

(b) the alternatives considered;

(c) advantages and disadvantages of the alternatives;

(d) the alternative or alternatives considered environmentally preferable;

(e) short and long-term effects of the decision;

(f) policy considerations that were balanced and considered in making the decision;

(g) whether all practical means to avoid or minimize environmental harm were adopted, and if not, why not; and

(h) a summary of implementation plans, including monitoring and enforcement procedures for mitigation, if any.

(4) This rule does not define or affect the statutory decision making authority of the agency." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA' NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"**XIX. EMERGENCIES** (1) The agency may take or permit action having a significant impact on the quality of the human environment in an emergency situation without preparing an EIS. Within 30 days following initiation of the action, the agency shall notify the governor and the EQC as to the need for the action and the impacts and results of it. Emergency actions must be limited to those actions immediately necessary to control the impacts of the emergency." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 28, Eff. 12/23/88.)**

"XX. CONFIDENTIALITY (1) Information declared confidential by state law or by an order of a court must be excluded from an EA and EIS. The agency shall briefly state the general topic of the confidential information excluded." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XXI. RESOLUTION OF STATUTORY CONFLICTS (1) Whenever a conflicting provision of another state law prevents the agency from fully complying with [these rules] the agency shall notify the governor and the EQC of the nature of the conflict and shall suggest a proposed course of action that will enable the agency to comply to the fullest extent possible with the provisions of MEPA. this notification must be made as soon as practical after the agency recognizes that a conflict exists, and no later than 30 days following such recognition.

(2) The agency has a continuing responsibility to review its programs and activities to evaluate known or anticipated conflicts between [these rules] and other statutory or regulatory requirements. It shall make such adjustments or recommendations as may be required to ensure maximum compliance with MEPA and these rules." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XXII. CONTRACTS AND DISCLOSURE (1) The agency may contract for preparation of an EIS or portions thereof. Whenever an EIS or portion thereof is prepared by a contractor, the agency shall furnish guidance and participate in the preparation, independently evaluate the statement or portion thereof prior to its approval, and take responsibility for its scope and content.

(2) A person contracting with the agency in the preparation of an EIS must execute a disclosure statement, in affidavit form prepared by the agency, specifying that he has no financial or other interest in the outcome of the proposed action other than a contract with the agency." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XXIII. PUBLIC HEARINGS (1) Whenever a public hearing is held on an EIS or an EA, the agency shall issue a news release legal notice to newspapers of general circulation in the area to be affected by the proposed action prior to the hearing. The news release or legal notice must advise the public of the nature of testimony the agency wishes to receive at the hearing. The hearing must be held after the draft EIS has been circulated and prior to preparation of the final EIS. A hearing involving an action for which an EA was prepared must be held after the EA has been circulated and

prior to any final agency determinations concerning the proposed action. In cases involving an applicant, the agency shall allow an applicant a reasonable time to respond in writing to comments made at a public hearing, notwithstanding the time limits contained in Rule XII. The applicant may waive his right to respond to comments made at a hearing.

(2) In addition to the procedure in (1) above, the agency shall take such other steps as are reasonable and appropriate to promote the awareness by interested parties

of a scheduled hearing.

(3) The agency shall hold a public hearing whenever requested within 20 days of issuance of the draft EIS by either:

(a) 10% or 25, whichever is less, of the persons who will be directly affected by the proposed action;

(b) by another agency which has jurisdiction over the action;

(c) an association having not less than 25 members who will be directly affected by the proposed action; or

(d) the applicant, if any.

(4) In determining whether a sufficient number of persons have requested a hearing as required by subsection (3), the agency shall resolve instances of doubt in favor of holding a public hearing.

(5) No person may give testimony at the hearing as a representative of a participating agency. Such a representative may, however, at the discretion of the hearing officer, give a statement regarding his or her agency's authority or procedures and answer questions from the public.

(6) Public meetings may be held in lieu of formal hearings as a means of soliciting public comment on an EIS where no hearing is requested under (3) above. However, the agency shall provide adequate advance notice of the meeting; and, other than the degree of formality surrounding the proceedings, the objectives of such a meeting are essentially the same as those for a hearing." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 28, Eff. 12/23/88.)**

"**XXIV. FEES: DETERMINATION OF AUTHORITY TO IMPOSE** (1) Whenever an application for a lease, permit, contract, license or certification is expected to result in the agency incurring expenses in excess of $2,500 to compile an EIS, the applicant is required to pay a fee in an amount the agency reasonably estimates, as set forth in this rule, will be expended to gather information and data necessary to compile an EIS.

(2) The agency shall determine within 30 days after a completed application is filed whether it will be necessary to compile an EIS and assess a fee as prescribed by this rule. If it is determined that an EIS is necessary, the agency shall make a preliminary estimate of its costs. This estimate must include a summary of the data and
information needs and the itemized costs of acquiring the data and information for the EIS.

(3) Whenever the preliminary estimated costs of acquiring the data and information to prepare an EIS total more than $2,500, the agency shall notify the applicant that a fee must be paid and submit an itemized preliminary estimate of the cost of acquiring the data and information necessary to compile an EIS. The agency shall also notify the applicant to prepare and submit a notarized and detailed estimate of the cost of the project being reviewed in the EIS within 15 days. In addition, the agency shall request the applicant to describe the data and information available or being prepared by the applicant which can possibly be used in the EIS. The applicant may indicate which of the agency's estimated costs of acquiring data and information for the EIS would be duplicative or excessive. The applicant must be granted, upon request, an extension of the 15-day period for submission of an estimate of the

project's cost and a critique of the agency's preliminary EIS data and information accumulation cost assessment." **(History: Sec. 75-1-202, MCA; IMP: Sec. 75-1-202, 203, 205, 206, and 207, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"**XXV. FEES: DETERMINATION OF AMOUNT** (1) After receipt of the applicant's estimated cost of the project and analysis of an agency's preliminary estimate of the cost of acquiring information and data for the EIS, the agency shall notify the applicant within 15 days of the final amount of the fee to be assessed. The fee assessed must be based on the projected cost of acquiring all of the information and data needed for the EIS. If the applicant has gathered or is in the process of gathering information and data that can be used in the EIS, the agency shall only use that portion of the fee that is needed to verify the information and data. Any unused portion of the fee assessed may be returned to the applicant within a reasonable time after the information and data have been collected or the information and data submitted by the applicant have been verified, but in no event later than the deadline specified in these rules. The agency may extend the 15-day period provided for review of the applicant's submittal but not to exceed 45 days if it believes that the project cost estimate submitted is inaccurate or additional information must be obtained to verify the accuracy of the project cost estimate. The fee assessed must not exceed the limitations provided in 75-1-203(2), MCA.

(2) If an applicant believes that the fee assessed is excessive or does not conform to the requirements of this rule or Title 75, chapter 1, part 2, MCA, the applicant may request a hearing pursuant to the contested case provisions of the Montana Administrative Procedure Act. If a hearing is held on the fee assessed as authorized by this subsection, the agency shall proceed with its analysis of the project wherever possible. The fact that a hearing has been requested is not grounds for delaying consideration of an application except to the extent that the portion of the fee in question affects the ability of the department to collect the data and information necessary for the department to collect the data and information necessary for the EIS." **(History: Sec. 75-1-202, MCA; IMP: Sec. 75-1-202, 203, 205, 206 and 207, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"**XXVI. USE OF FEE** (1) The fee assessed hereunder may only be used to gather data and information necessary to compile an EIS. No fee may be assessed if an agency intends only to compile an EA or a programmatic review. If a department collects a fee and later determines that additional data and information must be collected or that data and information supplied by the applicant and relied upon by the agency are inaccurate or invalid, an additional fee may be assessed under the procedures outlined in these rules if the maximum fee has not been collected.

(2) Whenever the agency has completed work on the EIS, it shall submit to the applicant a complete accounting of how any fee was expended. If the money expended is less than the fee collected, the remainder of the fee shall be refunded to the applicant without interest within 45 days after work has been completed on the final EIS." **(History: Sec. 75-1-202, MCA; IMP: Sec. 75-1-202, 203, 205, 206 and 207, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

MEPA Model Rules/Agency Administrative Rules Cross Reference Table

Agencies Acronyms:

Department of Agriculture:	(DOA)
Department of Commerce:	(DOC)
Department of Fish, Wildlife & Parks:	(DFWP)
Department of Health and Environmental Sciences:	(DHES)
Department of Natural Resources and Conservation:	(DNRC)
Department of State Lands	(DSL)
Department of Transportation:	(DOT)

Model Rule I: POLICY STATEMENT CONCERNING MEPA RULES ----------	DOA:4.2.312 DOC: 8.2.302 DFWP: 12.2.428 DHES: 16.2.624 DNRC: 36.2.521 DSL: 26.2.641 DOT: 18.2.235
Model Rule II: DEFINITIONS ----------	DOA: 4.2.313 DOC: 8.2.303 DFWP: 12.2.429 DHES: 16.2.625 DNRC: 36.2.522 DSL: 26.2.642 DOT: 18.2.236
Model Rule III: GENERAL REQUIREMENTS FOR ENVIRONMENTAL REVIEW ----------	DOA: 4.2.314 DOC: 8.2.304 DFWP: 12.2.430 DHES: 16.2.626 DNRC: 36.2.523 DSL: 26.2.643 DOT: 18.2.237
Model Rule IV: DETERMINING THE SIGNIFICANCE OF IMPACTS ----------	DOA: 4.2.315 DOC: 8.2.305 DFWP: 12.2.431 DHES: 16.2.627 DNRC: 36.2.524 DSL: 26.2.644 DOT: 18.2.238
Model Rule V: PREPARATION AND CONTENTS OF ENVIRONMENTAL ASSESSMENTS ----------	DOA: 4.2.316 DOC: 8.2.306 DFWP: 12.2.432 DHES: 16.2.628 DNRC: 36.2.525 DSL: 26.2.645 DOT: 18.2.239

Model Rule VI: PUBLIC REVIEW OF ENVIRONMENTAL ASSESSMENTS ---------- DOA: 4.2.317
DOC: 8.2.307
DFWP: 12.2.433
DHES: 16.2.629
DNRC: 36.2.526
DSL: 26.2.646
DOT: 18.2.240

Model Rule VII: DETERMINING THE SCOPE OF AN EIS ---------- DOA: 4.2.318
DOC: 8.2.308
DFWP: 12.2.434
DHES: 16.2.630
DNRC: 36.2.527
DSL: 26.2.647
DOT: 18.2.241

Model Rule VIII: ENVIRONMENTAL IMPACT STATEMENTS--GENERAL REQUIREMENTS---------- DOA: 4.2.319
DOC: 8.2.309
DFWP: 12.2.435
DHES: 16.2.631
DNRC: 36.2.528
DSL: 26.2.648
DOT: 18.2.242

Model Rule IX: PREPARATION AND CONTENTS OF DRAFT ENVIRONMENTAL IMPACT STATEMENTS---------- DOA: 4.2.320
DOC: 8.2.310
DFWP: 12.2.436
DHES: 16.2.632
DNRC: 36.2.529
DSL: 26.2.649
DOT: 18.2.243

Model Rule X: ADOPTION OF DRAFT ENVIRONMENTAL IMPACT STATEMENTS AS FINAL---------- DOA: 4.2.321
DOC: 8.2.311
DFWP: 12.2.437
DHES: 16.2.633
DNRC: 36.2.530
DSL: 26.2.650
DOT: 18.2.244

Model Rule XI: PREPARATION AND CONTENTS OF FINAL ENVIRONMENTAL IMPACT STATEMENT---------- DOA: 4.2.322
DOC: 8.2.312
DFWP: 12.2.438
DHES: 16.2.634
DNRC: 36.2.531
DSL: 26.2.651
DOT: 18.2.245

Model Rule XII: TIME LIMITS AND DISTRIBUTION OF ENVIRONMENTAL IMPACT STATEMENT---------- DOA: 4.2.323
DOC: 8.2.313
DFWP: 12.2.439
DHES: 16.2.635
DNRC: 36.2.532
DSL: 26.2.652
DOT: 18.2.246

Model Rule XIII: SUPPLEMENTS TO ENVIRONMENTAL IMPACT STATEMENTS------ DOA: 4.2.324
DOC: 8.2.314
DFWP: 12.2.440
DHES: 16.2.636
DNRC: 36.2.533
DSL: 26.2.653
DOT: 18.2.247

Model Rule XIV: ADOPTION OF AN EXISTING EIS ---------- DOA: 4.2.325
DOC: 8.2.315
DFWP: 12.2.441
DHES: 16.2.637
DNRC: 36.2.534
DSL: 26.2.654
DOT: 18.2.248

Model Rule XV: INTERAGENCY COOPERATION ---------- DOA: 4.2.326
DOC: 8.2.316
DFWP: 12.2.442
DHES: 16.2.638
DNRC: 36.2.535
DSL: 26.2.655
DOT: 18.2.249

Model Rule XVI: JOINT ENVIRONMENTAL IMPACT STATEMENTS AND EA'S---------- DOA: 4.2.327
DOC: 8.2.317
DFWP: 12.2.443
DHES: 16.2.639
DNRC: 36.2.536
DSL: 26.2.656
DOT: 18.2.250

Model Rule XVII: PREPARATION, CONTENT, AND DISTRIBUTION OF A PROGRAMMATIC REVIEW ---------- DOA: 4.2.328
DOC: 8.2.318
DFWP: 12.2.444
DHES: 16.2.640
DNRC: 36.2.537
DSL: 26.2.657
DOT: 18.2.251

Model Rule XVIII: RECORD OF DECISION FOR ACTIONS REQUIRING ENVIRONMENTAL IMPACT STATEMENTS	DOA: 4.2.329 DOC: 8.2.319 DFWP: 12.2.445 DHES: 16.2.641 DNRC: 36.2.538 DSL: 26.2.658 DOT: 18.2.252
Model Rule XIX: EMERGENCIES	DOA: 4.2.330 DOC: 8.2.320 DFWP: 12.2.446 DHES: 16.2.642 DNRC: 36.2.539 DSL: 26.2.659 DOT: 18.2.253
Model Rule XX: CONFIDENTIALITY	DOA: 4.2.331 DOC: 8.2.321 DFWP: 12.2.447 DHES: 16.2.643 DNRC: 36.2.540 DSL: 26.2.660 DOT: 18.2.254
Model Rule XXI: RESOLUTION OF STATUTORY CONFLICTS	DOA: 4.2.332 DOC: 8.2.322 DFWP: 12.2.448 DHES: 16.2.644 DNRC: 36.2.541 DSL: 26.2.661 DOT: 18.2.255
Model Rule XXII: CONTRACTS AND DISCLOSURE	DOA: 4.2.333 DOC: 8.2.323 DFWP: 12.2.449 DHES: 16.2.645 DNRC: 36.2.542 DSL: 26.2.662 DOT: 18.2.256
Model Rule XXIII: PUBLIC HEARINGS	DOA: 4.2.334 DOC: 8.2.324 DFWP: 12.2.450 DHES: 16.2.646 DNRC: 36.2.543 DSL: 26.2.663 DOT: 18.2.257
Model Rule XXIV: FEES: DETERMINATION OF AUTHORITY TO IMPOSE	DOA: 4.2.335 DOC: 8.2.325 DFWP: 12.2.451 DHES: 16.2.647 DNRC: 36.2.544 DSL: 26.2.628 DOT: 18.2.258

Model Rule XXV: FEES: DETERMINATION OF AMOUNT ----------	DOA: 4.2.336 DOC: 8.2.326 DFWP: 12.2.452 DHES: 16.2.648 DNRC: 36.2.545 DSL: 26.2.629 DOT: 18.2.259
Model Rule XXVI: USE OF FEES ----------	DOA: 4.2.337 DOC: 8.2.327 DFWP: 12.2.453 DHES: 16.2.649 DNRC: 36.2.546 DSL: 26.2.630 DOT: 18.2.260

NOTE: DSL HAS SPECIFIC FEE CATEGORIES:

FEE ASSESSMENT CATEGORIES: GENERAL REQUIREMENTS ---------	DSL: 26.2.634
FEE ASSESSMENT CATEGORIES: HARD ROCK ----------	DSL: 26.2.635
FEE ASSESSMENT CATEGORIES: OPEN CUT ----------	DSL: 26.2.636
FEE ASSESSMENT CATEGORIES: STRIP AND UNDERGROUND MINE SITING----------	DSL: 26.2.637
FEE ASSESSMENT CATEGORIES: STRIP AND UNDERGROUND MINE RECLAMATION ----------	DSL: 26.2.338
FEE ASSESSMENT CATEGORIES: STATE LANDS ----------	DSL: 26.2.339
DEPARTMENTAL ASSISTANCE TO APPLICANTS ----------	DSL: 26.2.440

APPENDIX C

Model EA Checklist Format

Introduction

The environmental assessment (EA) checklist is a tool designed to assist state agencies in reviewing proposed actions under the Montana Environmental Policy Act (MEPA) and the agency MEPA Rules. The checklist is specifically designed to help the reviewer and the decision-maker analyze the impacts of the proposed action, evaluate reasonable alternatives to the proposed action, and determine whether the proposed action would have significant impacts on the quality of the human environment, and thus require preparation of an environmental impact statement (EIS).

The EA checklist presents the range of environmental resources and values that are potentially subject to impacts. For each resource, the reviewer is asked to determine the level of impact that can be anticipated if the proposed action is undertaken. In completing the checklist, the reviewer will also become aware of subjects where additional information is needed.

The EA checklist provides a systematic method for the evaluation of environmental impacts under MEPA. The checklist also helps document an agency's decision on whether an EIS is necessary.

As a cautionary note, an EA checklist will not be the appropriate level of review for all agency actions. Some agency actions may require a more detailed narrative analysis. It is strictly an agency decision as to what form of analysis is appropriate under the circumstances.

Agencies are in no way required to follow this generic EA Checklist format. In fact, agencies are encouraged to modify the checklists for each type of agency action to ensure that questions addressing all potentially affected environmental resources and values are included.

Instructions

PART I Proposed Action Description

Part I of the EA Checklist is a summary of basic information about the proposed action. The checklist is designed to accommodate environmental evaluation of all types of proposed actions, including those initiated by an agency and those that involve the approval of permits or licenses or distribution of funds to an applicant. The reviewer should fill in all of the information in order to provide the agency decision-maker and other interested persons with a descriptive overview of the proposed action and the location that would be affected. This information will be available in the agency's files or the application submitted by a project sponsor.

PART II Environmental Review

Under this part, the reviewer is asked to complete three sections: (1) checklists of potential environmental

impacts; (2) an evaluation of reasonable alternatives; and (3) a list of mitigation and stipulation measures.

1. Physical and Human Environment Checklist

The physical and human environment checklists address a broad array of environmental resources and values, although the lists are not exhaustive and may not include all possible types of impacts that could result from specific agency actions. Each question within a given checklist is generic and may potentially encompass a number of specific impacts depending on the complexity of the proposed action. At the conclusion of each checklist the reviewer must narratively analyze the cumulative and secondary impacts, if any, the proposed action may have on the specific resource or value.

(a) The reviewer should indicate by a check mark the anticipated level of impact on each feature of the environment addressed by the checklist questions. In making this evaluation, the reviewer should keep in mind the significance criteria noted in the agency's MEPA rules (MEPA Model Rule IV).

(b) If the nature of an impact is "unknown" the reviewer should explain in Part III entitled " Narrative Evaluation," why the unknown impact has not or can not be evaluated. The reviewer should also consider the risks to human health and safety and to the environment in deciding whether the unknown impact may be significant.

(c) "Maybe" answers should always be considered "yes" answers for purposes of checking off specific impacts. For example, if a reviewer has any doubt about whether an impact may be potentially significant, the impact should be considered potentially significant rather than minor pending further investigation.

(d) If there is an impact on the physical or human environment whether it be minor or potentially significant, the reviewer should (in Part III) describe the scope and level of the impact and the specific resources it affects.

(e) The reviewer should assume that a project will comply with agency rules and any standard stipulations or permit requirements that are routinely applied to a particular type of project and that would mitigate impacts.

(f) The reviewer should place a check in the column entitled "Can Impacts Be Mitigated" if stipulations are enforceable by the agency or another governmental agency. The reviewer should discuss the stipulations or mitigation measures in detail in Part II (3).

(g) In some cases a potentially significant impact can be reduced below the level of significance by mitigation. Under this scenario, if the agency can show that all of the impacts of the proposed action have been identified, that the impacts will be mitigated below the level of significance, and that no significant impact is likely to occur, then this document, for purposes of the agency

MEPA rules, becomes a "mitigated" EA. The agency can not consider compensation for purposes of determining whether a given impact has been mitigated below the level of significance. For a mitigated EA to suffice, the agency must provide an opportunity for public comment, a public meeting or hearing, and adequate notice. The agency is responsible for determining appropriate methods to ensure adequate public review on a case by case basis. A mitigated EA usually requires a more in-depth narrative analysis of the impacts than is provided for in an EA checklist. In these cases the reviewer should check both categories on the checklist labelled "Potentially Significant" and "Can Impact Be Mitigated" and re-issue a revised narratively detailed mitigated EA.

(h) If the reviewer indicates that acceptable mitigation can be achieved, this means that site-specific mitigation is necessary and must be tailored to the individual project and proposed location that are being reviewed. Such measures must be the subject of narrative documentation of Part II (3).

(i) The reviewer is required under the agency MEPA rules to evaluate the cumulative and secondary impacts of the proposed action on the physical and human environments. Under each impact checklist, there is a section which directs the reviewer to discuss the cumulative and secondary effects on the specific resource or value if any. Attach additional sheets of paper as needed. For point of reference, "cumulative" and "secondary" impacts are defined in the agency MEPA rules.

2. Discussion and Evaluation of Reasonable Alternatives

(a) The reviewer must describe and analyze reasonable alternatives to the proposed action including the "no action" alternative (MEPA Model Rule II (2)). Reasonable alternatives are those that are realistic, technologically available, and that represent a course of action that bears a logical relationship to the proposal being evaluated.

(b) The reviewer is required to include and evaluate a "no action" alternative. There are two interpretations of the "no action" alternative: (1) the reviewer analyzes environmental conditions where there is no change from the current status quo; or (2) the reviewer evaluates environmental conditions where the proposed action does not take place. The reviewer should utilize the interpretation of the "no action" alternative that results in the least change to the environment from the current situation--both favorable and unfavorable. The "no action" alternative provides the reviewer with the baseline condition or point of reference for evaluating environmental effects. It provides a comparison of environmental conditions without the proposal.

3. List and Appropriate Evaluation of Mitigation, Stipulation, or Other Control Measures.

(a) Mitigation measures or stipulations are designed to reduce or prevent undesirable effects. The

reviewer should discuss in detail any mitigation measure that is enforceable by the agency or another governmental agency. Note that the agency MEPA rules further clarify the concept of "mitigation" (MEPA Model Rule II (14)).

(b) The reviewer should describe what the stipulation is, what impact(s) the stipulation addresses, and how the agency plans to enforce the stipulation. If another governmental agency is involved, the reviewer should in addition to describing the stipulation, state whether that agency plans to enforce the stated stipulation

(c) Note that if the reviewer plans to mitigate an impact below the level of significance, the reviewer should follow the procedural and substantive requirements of a mitigated EA set out in the agency MEPA rules (MEPA Model Rules III (4) and VI (4)).

PART III Narrative Evaluation and Comment

This part of the Environmental Checklist provides the reviewer with space to expand and supplement the checklist with narrative discussion and analysis of specific issues. These issues should be cross referenced in the checklist under the "Comment Index" column of the checklist. The reviewer must determine the level of narrative documentation that is appropriate under the circumstances given the scope and complexity of the proposed action, the environmental sensitivity of the area, the degree of uncertainty that the proposed action will result in significant impacts and the need for and complexity of mitigation measures.

Note that if the analysis from Part II and III indicates that the proposed action would have a significant impact on the quality of the human environment, the statute and the MEPA rules require an agency to prepare an EIS unless the agency can show that all of the impacts of the proposed action have been identified, that they will be mitigated below the level of significance, and that no significant impact is likely to occur. Even if these mitigated EA threshold requirements are met by the agency, the reviewer should still consider the following factors in determining whether an EIS or Mitigated EA is appropriate:

(1) The reviewer should be able to obtain any necessary data and identify the nature of the impact and mitigation without major commitment of time and funding.

(2) The mitigation should be easy to apply and should be clearly within the agency's authority to implement (e.g. involve specific modifications in the design of the project, well defined construction and operational procedures).

(3) The agency should have little or no doubt about the effectiveness of the mitigation in avoiding or reducing the impacts that would otherwise have been deemed significant.

(4) The sensitivity of the area that would be affected by a proposed action and the level of public interest generated by the proposed action are

likely to be major factors that will presumably influence the determination of the appropriate level of environmental review.

In completing Parts II and III, the reviewer should be guided by the question: has my evaluation been reasonable? The reviewer is not expected to be an expert technical analyst for all environmental resources, although for complex projects the involvement of various specialists may be necessary.

PART IV EA Conclusion Section

This section asks the reviewer to: (1) determine whether an EIS is necessary and if not, explain why the EA is the appropriate level of review; (2) describe the level of public involvement for this EA; and (3) document who was responsible for preparing the EA.

GENERIC EA CHECKLIST FORMAT

PART I. PROPOSED ACTION DESCRIPTION

1. Type of Proposed State Action_____

2. Agency Authority for the Proposed Action_____
_____

3. Name of Project_____

4. Name, Address and Phone Number of Project Sponsor (if other than the agency)_____
_____

5. If Applicable:

Estimated Construction/Commencement Date_____
_____

Estimated Completion Date_____

Current Status of Project Design (% complete)_____

6. Location Affected by Proposed Action (county, range and township)
_____

7. Project Size: Estimate the number of acres that would be directly affected that are currently:

(a) Developed:
residential...____acres
industrial....____acres

(b) Open Space/Woodlands/
Recreation.....____acres

(c) Wetlands/Riparian
Areas.....____acres

(d) Floodplain...____acres

(e) Productive:
irrigated cropland...____acres
dry cropland.....____acres
forestry.....____acres
rangeland.....____acres
other.....____acres

8. Map/site plan: attach an original 8 1/2" x 11" or larger section of the most recent USGS 7.5' series topographic map showing the location and boundaries of the area that would be affected by the proposed action. A different map scale may be substituted if more appropriate or if required by agency rule. If available, a site plan should also be attached.

9. Narrative Summary of the Proposed Action or Project including the Benefits and Purpose of the Proposed Action.

10. Listing of any other Local, State or Federal agency that has overlapping or additional jurisdiction

(a) Permits:

Agency Name	Permit	Date Filed/#

(b) Funding:

Agency Name	Funding Amount

(c) Other Overlapping or Additional Jurisdictional Responsibilities:

Agency Name	Type of Responsibility

11. List of Agencies Consulted During Preparation of the EA:

PART II. ENVIRONMENTAL REVIEW

1. Evaluation of the Impacts of the Proposed Action Including Secondary and Cumulative Impacts on the Physical and Human Environment:

IMPACTS

PHYSICAL ENVIRONMENT	UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
1. LAND RESOURCES Will the proposed action result in: a. Soil instability or changes in geologic substructure? b. Disruption, displacement, erosion, compaction, moisture loss, or over-covering of soil which would reduce productivity or fertility? c. Destruction, covering or modification of any unique geologic or physical features? d. Changes in siltation, deposition or erosion patterns that may modify the channel of a river or stream or the bed or shore of a lake? e. Exposure of people or property to earthquakes, landslides, ground failure, or other natural hazard? f. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

Narrative Description and Evaluation of the Cumulative and Secondary Effects on Land Resources (Attach additional pages of narrative if needed):

PHYSICAL ENVIRONMENT (Continued)	IMPACTS					
	UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
2. AIR Will the proposed action result in: a. Emission of air pollutants or deterioration of ambient air quality? b. Creation of objectionable odors? c. Alteration of air movement, moisture, or temperature patterns or any change in climate, either locally or regionally? d. Adverse effects on vegetation, including crops, due to increased emissions of pollutants? e. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

Narrative Description and Evaluation of the Cumulative and Secondary Effects on Air Resources (Attach additional pages of narrative if needed):

PHYSICAL ENVIRONMENT (Continued)	IMPACTS					
	UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
3. WATER Will the proposed action result in: a. Discharge into surface water or any alteration of surface water quality including but not limited to temperature, dissolved oxygen or turbidity? b. Changes in drainage patterns or the rate and amount of surface runoff? c. Alteration of the course or magnitude of flood water or other flows? d. Changes in the amount of surface water in any water body or creation of a new water body? e. Exposure of people or property to water related hazards such as flooding? f. Changes in the quality of groundwater? g. Changes in the quantity of groundwater? h. Increase in the risk of contamination of surface or groundwater? i. Violation of the Montana Non-Degradation Statute? j. Effects on any existing water right or reservation? k. Effects on other water users as a result of any alteration in surface or groundwater quality? l. Effects on other users as a result of any alteration in surface or groundwater quantity? m. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

Narrative Description and Evaluation of the Cumulative and Secondary Effects on Water Resources (Attach additional pages of narrative if needed):

PHYSICAL ENVIRONMENT (Continued)	IMPACTS					
	UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
4. VEGETATION Will the proposed action result in: a. Changes in the diversity, productivity or abundance of plant species (including trees, shrubs, grass, crops, and aquatic plants)? b. Alteration of a plant community? c. Adverse effects on any unique, rare, threatened, or endangered plant species? d. Reduction in acreage or productivity of any agricultural land? e. Establishment or spread of noxious weeds? f. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

Narrative Description and Evaluation of the Cumulative and Secondary Effects on Vegetation Resources (Attach additional pages of narrative if needed):

PHYSICAL ENVIRONMENT (Continued)	IMPACTS					
	UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
5. FISH/WILDLIFE Will the proposed action result in: a. Deterioration of critical fish or wildlife habitat? b. Changes in the diversity or abundance of game animals or bird species? c. Changes in the diversity or abundance of nongame species? d. Introduction of new species into an area? e. Creation of a barrier to the migration or movement of animals? f. Adverse effects on any unique, rare, threatened, or endangered species? g. Increase in conditions that stress wildlife populations or limit abundance (including harassment, legal or illegal harvest or other human activity)? h. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

Narrative Description and Evaluation of the Cumulative and Secondary Effects on Fish/Wildlife Resources (Attach additional pages of narrative if needed):

HUMAN ENVIRONMENT	IMPACTS					
	UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
6. NOISE/ELECTRICAL EFFECTS Will the proposed action result in: a. Increases in existing noise levels? b. Exposure of people to severe or nuisance noise levels? c. Creation of electrostatic or electromagnetic effects that could be detrimental to human health or property? d. Interference with radio or television reception and operation? e. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

Narrative Description and Evaluation of the Cumulative and Secondary Effects on Noise/Electrical Effects (Attach additional pages of narrative if needed):

HUMAN ENVIRONMENT (Continued)	IMPACTS					
	UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
7. LAND USE Will the proposed action result in: a. Alteration of or interference with the productivity or profitability of the existing land use of an area? b. Conflict with a designated natural area or area of unusual scientific or educational importance? c. Conflict with any existing land use whose presence would constrain or potentially prohibit the proposed action? d. Adverse effects on or relocation of residences? e. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

Narrative Description and Evaluation of the Cumulative and Secondary Effects on Land Use (Attach additional pages of narrative if needed):

HUMAN ENVIRONMENT (Continued)	IMPACTS					
	UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
8. RISK/HEALTH HAZARDS Will the proposed action result in: a. Risk of an explosion or release of hazardous substances (including, but not limited to oil, pesticides, chemicals, or radiation) in the event of an accident or other forms of disruption? b. Affect an existing emergency response or emergency evacuation plan or create a need for a new plan? c. Creation of any human health hazard or potential hazard? d. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

Narrative Description and Evaluation of the Cumulative and Secondary Effects on Risk/Health Hazards (Attach additional pages of narrative if needed):

HUMAN ENVIRONMENT (Continued)	IMPACTS					
	UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
9. COMMUNITY IMPACTS Will the proposed action result in: a. Alteration of the location, distribution, density, or growth rate of the human population of an area? b. Alteration of the social structure of a community? c. Alteration of the level or distribution of employment or community or personal income? d. Changes in industrial or commercial activity? e. Increased traffic hazards or effects on existing transportation facilities or patterns of movement of people and goods? f. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

Narrative Description and Evaluation of the Cumulative and Secondary Effects on Community Impacts (Attach additional pages of narrative if needed):

HUMAN ENVIRONMENT (Continued)	IMPACTS					
	UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
10. PUBLIC SERVICES/ TAXES/UTILITIES Will the proposed action: a. Have an effect upon or result in a need for new or altered governmental services in any of the following areas: fire or police protection, schools, parks/recreational facilities, roads or other public maintenance, water supply, sewer or septic systems, solid waste disposal, health, or other governmental services? If any, specify:_____ b. Have an effect upon the local or state tax base and revenues? c. Result in a need for new facilities or substantial alterations of any of the following utilities: electric power, natural gas, other fuel supply or distribution systems, or communications? d. Result in increased used of any energy source? e. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

Narrative Description and Evaluation of the Cumulative and Secondary Effects on Public Services/Taxes/Utilities (Attach additional pages of narrative if needed):

HUMAN ENVIRONMENT (Continued)	IMPACTS: UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
11. AESTHETICS/ RECREATION Will the proposed action result in: a. Alteration of any scenic vista or creation of an aesthetically offensive site or effect that is open to public view? b. Alteration of the aesthetic character of a community or neighborhood? c. Alteration of the quality or quantity of recreational opportunities and settings? d. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

Narrative Description and Evaluation of the Cumulative and Secondary Effects on Aesthetics/Recreation (Attach additional pages of narrative if needed):

HUMAN ENVIRONMENT (Continued)	IMPACTS					
	UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
12. CULTURAL/ HISTORICAL RESOURCES Will the proposed action result in: a. Destruction or alteration of any site, structure or object of prehistoric, historic, or paleontological importance? b. Physical change that would affect unique cultural values? c. Effects on existing religious or sacred uses of a site or area? d. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

Narrative Description and Evaluation of the Cumulative and Secondary Effects on Cultural/Historical Resources (Attach additional pages of narrative if needed):

SIGNIFICANCE CRITERIA	IMPACTS					
	UNKNOWN*	NO IMPACTS	MINOR IMPACTS:*	POTENTIALLY SIGNIFICANT IMPACTS:*	CAN IMPACTS BE MITIGATED*	COMMENT INDEX
13. SUMMARY EVALUATION OF SIGNIFICANCE Will the proposed action, considered as a whole: a. Have impacts that are individually limited, but cumulatively considerable? (A project or program may result in impacts on two or more separate resources which create a significant effect when considered together or in total.) b. Involve potential risks or adverse effects which are uncertain but extremely hazardous if they were to occur? c. Potentially conflict with the substantive requirements of any local, state, or federal law, regulation, standard or formal plan? d. Establish a precedent or likelihood that future actions with significant environmental impacts will be proposed? e. Generate substantial debate or controversy about the nature of the impacts that would be created? F. Other:_____						

*Include an attachment with a narrative explanation describing the scope and level of impact. If the impact is unknown, explain why the unknown impact has not or can not be evaluated.

PART II. ENVIRONMENTAL REVIEW (Continued)

2. Description and analysis of reasonable alternatives (including the no action alternative) to the proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternatives would be implemented:

3. Evaluation and listing of mitigation, stipulation, or other control measures enforceable by the agency or another government agency:

PART III. NARRATIVE EVLAUATION AND COMMENT

PART IV. EA CONCLUSION SECTION

1. Based on the significance criteria evaluated in this EA, is an EIS required? YES / NO If an EIS is not required, explain why the EA is the appropriate level of analysis for this proposed action:

2. Describe the level of public involvement for this project if any and, given the complexity and the seriousness of the environmental issues associated with the proposed action, is the level of public involvement appropriate under the circumstances?

3. Duration of comment period if any:

4. Name, title, address and phone number of the Person(s) Responsible for Preparing the EA:

APPENDIX D
Procedural Content Checklists for MEPA Documents

There are specific procedural requirements each agency must adhere to when conducting a MEPA environmental review. The procedural content checklists are a compilation of those requirements taken from the MEPA Model Rules. They are designed to ensure that you have not inadvertently missed any of the MEPA requirements for the particular environmental review process that is being conducted. **When utilizing these checklists you should <u>always</u> refer to your specific agency MEPA rules and confer with an agency attorney to ensure that you have met your agency MEPA requirements.** Checklists in this appendix include the: EA, Draft EIS, Final EIS, and Supplemental EIS.

EA PROCEDURAL CONTENT CHECK-LIST

Reviewer: _____ **Agency:** _____

Date: _____ **Project:** _____

* ***Did the agency send the EA to the EQC and the*** **governor's office?** ☐

Date Document Sent:_____

Date Comment Period Ends:_____

COMMENTS:_____

_____

_____

* ***Does the EA describe the proposed action including maps and graphs?*** ☐

COMMENTS:_____

_____

_____

* *Does the EA describe the benefits and purpose of the proposed action?* ☐

Comments: _____

* *Is there a listing of any other local, state or federal agency that has overlapping or additional jurisdiction or responsibility?* ☐

COMMENTS: _____

* *Does the EA evaluate the impacts including secondary and cumulative impacts on the physical and human environment?* ☐

COMMENTS: _____

* *Is there a description and analysis of reasonable alternatives to the proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative(s) would be implemented?* ☐

COMMENTS: _____

* *Does the EA list and appropriately evaluate mitigation, stipulation, or other control measures enforceable by the agency or another government agency?* ☐

COMMENTS: _____

☐

* ***Does the EA list other agencies or groups that have been contacted or have contributed information?***

COMMENTS:_____
_____
_____

☐

* ***Does the EA list the names of the person(s) responsible for preparation of the EA?***

Name:_____

Date EA completed:_____

COMMENTS:_____
_____
_____

☐

* ***Is there a finding in the EA on the need for an EIS and, if appropriate an explanation of the reasons for preparing the EA? Additionally, if an EIS is not required does the EA describe the reasons the EA is the appropriate level of analysis?***

COMMENTS:_____
_____
_____

☐

* ***Given the complexity and the seriousness of the environmental issues associated with the proposed action, is type and level of analysis appropriate (i.e., is a check-list EA adequate under the circumstances)?***

COMMENTS:_____
_____
_____

☐

* ***Given the complexity and the seriousness of the environmental issues associated with the proposed action, is level of public involvement appropriate?***

COMMENTS:_____
_____
_____

☐

* *If this is a "mitigated" EA was there an opportunity for public comment? Did the agency conduct a public hearing? Was there adequate notice?*

COMMENTS: _____

_____

_____

CITE FOR CHECKLIST: MEPA MODEL RULE V-- ---------- DOA: 4.2.316
DOC: 8.2.306
DFWP: 12.2.432
DHES: 16.2.628
DNRC: 36.2.525
DSL: 26.2.645
DOT: 18.2.239

DRAFT EIS PROCEDURAL CONTENT CHECK-LIST

Reviewer:_____ **Agency:**_____

Date:_____ **Project:**_____

* **Did the agency send the EQC and the governor's office** *the draft EIS?* ☐

Date Document Sent:_____

Listed Transmittal Date:_____

Date Comment Period Ends:_____

Has the agency allowed necessary 30 day comment period? ☐

COMMENTS:_____
_____
_____

* ***Did the agency follow the procedures for determining the scope of the EIS?*** ☐

-Did the agency invite the participation of affected federal, state, and local government agencies, Indian tribes, the applicant, if any, and interested persons or groups. ☐

-During the scoping process were the following issues identified: ☐

(1) issues related to the proposed action that are likely to have significant impacts ☐

(2) issues that are not likely to involve significant impacts ☐

(3) issues that have been adequately addressed by prior environmental review ☐

☐ *-During the scoping process were possible alternatives identified?*

COMMENTS:_____
_____
_____

☐ * *Did the agency prepare with each draft and final EIS a summary that is available for distribution separate from the EIS which includes a description of:*

(1) the proposed action being evaluated by the EIS, the impacts, and the alternatives

(2) the areas of controversy and major conclusions

(3) tradeoffs among the alternatives

(4) the agency's preferred alternative, if any

COMMENTS:_____
_____
_____

☐ * *Does the EIS describe the proposed action including purpose and benefits?*

COMMENTS:_____
_____
_____

☐ * *Is there a listing of any other local, state or federal agency that has overlapping or additional jurisdiction or responsibility?*

COMMENTS:_____
_____
_____

☐ * *Does the EIS describe the current environmental conditions in the area affected by the proposed action or alternatives, including maps and charts where appropriate?*

COMMENTS: _____

_____

_____

* Does the EIS describe the impacts on the quality of the human environment including: ☐

-primary, secondary, and cumulative impacts on the physical and human environment including a detailed narrative and analysis where appropriate on the following topics: ☐

(1) terrestrial and aquatic life and habitat ☐

(2) water quality/quantity & distribution ☐

(3) geology ☐

(4) soil quality, stability, and moisture ☐

(5) vegetation cover (quantity & quality) ☐

(6) aesthetics ☐

(7) air quality ☐

(8) unique, endangered, fragile, or limited environmental resources of land, water, air and energy ☐

(9) social structures and mores ☐

(10) cultural uniqueness and diversity ☐

(11) access to and quality of recreational and wilderness activities ☐

(12) local and state tax base and tax revenues ☐

(13) agricultural or industrial production ☐

(14) human health ☐

(15) quantity and distribution of population and housing ☐

(16) demands for governmental services ☐

(17) industrial and commercial activity ☐

(18) locally adopted environmental plans and goals ☐

(19) other appropriate social and economic circumstances ☐

-*potential growth-inducing or growth-inhibiting impacts* ☐

-*irreversible and irretrievable commitments of environmental resources, including air, water and energy* ☐

-*economic and environmental benefits and costs of the proposed action* ☐

-*the relationship between local short-term uses of man's environment and the effect on maintenance and enhancement of the long-term productivity of the environment* ☐

COMMENTS:_____

_____

_____

* *Are the impacts of the proposed action discussed in a level of detail that is proportionate to their significance?* ☐

COMMENTS:_____

_____

_____

* *If a cost-benefit analysis has been prepared by the agency prior to the preparation of the draft EIS has the c/b been incorporated by reference in or appended to the EIS?* ☐

COMMENTS:_____

_____

_____

* *Is there a description and analysis of reasonable alternatives to the proposed action, including the alternative of no action and other reasonable alternatives that may or may not be within the jurisdiction of the agency to implement?* ☐

COMMENTS:_____

_____

_____

☐ * *Does the EIS explain the tradeoffs among the reasonable alternatives?*

COMMENTS: _____

☐ * *Does the EIS identify the agency's preferred alternative, if any, and its reasons for the preference?*

COMMENTS: _____

☐ * *Does the EIS discuss mitigation, stipulation or other controls committed to and enforceable by the agency or other government agency?*

COMMENTS: _____

☐ * *Is there a discussion of any compensation related to impacts stemming from the proposed action?*

COMMENTS: _____

☐ * Is there a section in the EIS on consultation and *preparation that includes the following:*

☐ *-names of those individuals or groups responsible for preparing the draft EIS*

☐ *-a listing of other agencies, groups, or individuals who were contacted or contributed information*

☐ *-a summary list of source materials used in preparation of the draft EIS*

COMMENTS: _____

* *Is the EIS analytic rather than encyclopedic?* ☐

COMMENTS: _____

_____

_____

* *Has the agency adopted this draft EIS as final?* ☐
If so, has the agency complied with the following:

-Did the agency make a determination on whether to adopt the DEIS as final within 30 days of the close of the comment period on the DEIS? ☐

-Did the agency notify the governor, the EQC, the applicant, if any, and all commenters of its decision? (Notification must include a copy of all comments received in response to the draft statement and an explanation of why the issues raised do not warrant the preparation of a FEIS. ☐

-Did the agency provide public notice of its intention to adopt the DEIS as a final EIS? ☐

-Did the agency make its final decision on the proposed action no sooner than 15 days after complying with the above requirements? ☐

CITES FOR CHECKLIST: MEPA MODEL RULES VIII, IX, X, & XII

MODEL RULE VIII----
DOA: 4.2.319
DOC: 8.2.309
DFWP: 12.2.435
DHES: 16.2.631
DNRC: 36.2.528
DSL: 26.2.648
DOT: 18.2.242

MODEL RULE IX------
DOA: 4.2.320
DOC: 8.2.310
DFWP: 12.2.436
DHES: 16.2.632
DNRC: 36.2.529
DSL: 26.2.649
DOT: 18.2.243

MODEL RULE X--------	**DOA: 4.2.321**
	DOC: 8.2.311
	DFWP: 12.2.437
	DHES: 16.2.633
	DNRC: 36.2.530
	DSL: 26.2.650
	DOT: 18.2.244
MODEL RULE XII------	**DOA: 4.2.323**
	DOC: 8.2.313
	DFWP: 12.2.439
	DHES: 16.2.635
	DNRC: 36.2.532
	DSL: 26.2.652
	DOT: 18.2.246

FINAL EIS PROCEDURAL CONTENT CHECK-LIST

Reviewer:_____ **Agency:**_____

Date:_____ **Project:**_____

* ***Did the agency send the EQC and Governor's office a copy of the Final EIS?*** ☐

Date Document Sent:_____

Listed Transmittal Date:_____

Date Comment Period Ends:_____

Has the agency allowed 15 days from date of transmittal to expire prior to making a final decision? ☐

COMMENTS:_____
_____
_____

* ***Does the FEIS summarize major conclusions, supporting information and responses to substantive comments from the draft EIS, stating specifically where such conclusions and information were changed from those which appeared in the draft?*** ☐

COMMENTS:_____
_____
_____

* ***Does the FEIS list all sources of written and oral comments on the draft EIS, including those obtained in public hearings and, unless impractical, the text of comments received by the agency? (in all cases, a representative sample of comments must be included).*** ☐

COMMENTS:_____
_____
_____

☐ * *Has the agency in the FEIS responded to substantive comments including an evaluation of the comments received and disposition of the issues involved?*

COMMENTS: _____

☐ * *Does the FEIS contain data, information, and explanations obtained subsequent to circulation of the draft, if any?*

COMMENTS: _____

☐ * *Does the FEIS contain the agency's recommendation, preferred alternative, or proposed decision together with an explanation of the reason therefor?*

COMMENTS: _____

CITE FOR CHECKLIST: MEPA MODEL RULES XI & XII---

MODEL RULE XI------
DOA: 4.2.322
DOC: 8.2.312
DFWP: 12.2.438
DHES: 16.2.634
DNRC: 36.2.531
DSL: 26.2.651
DOT: 18.2.245

MODEL RULE XII------
DOA: 4.2.323
DOC: 8.2.313
DFWP: 12.2.439
DHES: 16.2.635
DNRC: 36.2.532
DSL: 26.2.652
DOT: 18.2.246

SUPPLEMENTS TO ENVIRONMENTAL IMPACT STATEMENTS PROCEDURAL CONTENT CHECK-LIST

Reviewer:_____ **Agency:**_____

Date:_____ **Project:**_____

* ***Did the agency send a copy of the Supplemental EIS to the EQC and the Governor's office?*** ☐

Date Document Sent:_____

Listed Transmittal Date:_____

Date Comment Period Ends:_____

Has the agency allowed 30 days from date of transmittal for comment on the draft supplement? ☐

If this is a final draft supplement, has the *agency allowed 15 days from the date of transmittal to expire prior to making a final decision?* ☐

COMMENTS:_____

_____

_____

* ***Under which of the following criteria has the agency made a determination to prepare a supplement(s) to either a draft or final EIS:***

-agency or applicant has made a substantial change in the proposed action ☐

-there are significant new circumstances, discovered prior to the final agency decision, including information bearing on the proposed action or its impacts that change the basis for the decision ☐

-after the preparation of the draft EIS and prior to the completion of a final EIS, the agency determined that there was a need for substantial, additional information to evaluate the impacts of the proposed action or reasonable alternatives ☐

COMMENTS:_____

_____

_____

* *Does the Supplement include a description of the following:* ☐

-an explanation of the need for the supplement ☐

-the proposed action ☐

-any impacts, alternatives or other items required by rule for a draft EIS or FEIS that were not covered in the original statement or that must be revised based on new information or circumstances concerning the proposed action. ☐

COMMENTS:_____

_____

_____

CITE FOR CHECKLIST: MEPA MODEL RULE XIII--- DOA: 4.2.324
DOC: 8.2.314
DFWP: 12.2.440
DHES: 16.2.636
DNRC: 36.2.533
DSL: 26.2.653
DOT: 18.2.247

APPENDIX E

NEPA vs. MEPA: An Analysis

Introduction

Many state projects and permits fall under joint federal and state jurisdiction or are funded by federal dollars. The National Environmental Policy Act (NEPA) and the Montana Environmental Policy Act (MEPA) usually require federal and state environmental review for these activities. A common question often raised by state agency personnel is whether an environmental review document conducted under the NEPA process is legally sufficient for MEPA or conversely whether a document written for MEPA is can pass legal muster under NEPA? This appendix attempts to address this query by evaluating the statutory and administrative rule variations and similarities between NEPA and MEPA. The appendix also provides a copy of the CEQ regulations and a copy of the NEPA statute. Cites to the applicable federal and state agency NEPA/MEPA rules are located at the end of the appendix.

As a cautionary note, do not rely on this appendix for legal authority--always consult your agency MEPA rules and the applicable federal agency NEPA rules to ensure that the document you are preparing is procedurally adequate.

A Statutory Comparison

Patterned almost word for word after the 1969 National Environmental Policy Act, Montana's 1971 environmental policy act is essentially a mirror image of NEPA. There are however, a few important differences worth noting.

The most fundamental distinction between the two statutes is that NEPA applies only to federal actions while MEPA applies strictly to state actions. It is not uncommon for a state project to trigger both NEPA and MEPA review. Many state projects are funded by federal dollars requiring the federal agency in charge of money allocation to conduct a NEPA review and requiring the state agency in charge of the project to conduct a MEPA review. Conversely, a federal agency may be exempt from NEPA requirements and still provide a state agency with funds for a project or activity that triggers MEPA--requiring the state agency to conduct an environmental review. Although MEPA and NEPA are virtually identical in their mandates, the implementation of NEPA and MEPA is mutually exclusive and self executing.

Another basic difference is highlighted in the policy statements of each statute. MEPA recognizes that "each person **shall be entitled** to a healthful environment".[1] Such entitlement language is purposely absent in NEPA. NEPA only notes that "each person

[1] 75-1-103, MCA.

should enjoy a healthful environment".[2] To "enjoy a healthful environment" is to happy or satisfied that the environment is healthful. To be entitled to a healthful environment implies that each person in the state of Montana has a right or claim to a healthful environment. It is an important substantive distinction in policy.

Understandably, the National Act is much broader in its application. It commits federal agencies to "recognize the worldwide and long-range character of environmental problems" in order to prevent a "decline in the quality of mankind's world environment".[3] MEPA is silent on global environmental problems and impacts.

NEPA also requires that federal agencies "initiate and utilize ecological information in the planning and development of resource-oriented projects".[4] Although this language is absent in MEPA, impact analysis and the "interdisciplinary approach" usually necessitate some type of ecological analysis.

Finally, NEPA and MEPA differ in the type of entities created to over-see the implementation of each statute. NEPA's Council on Environmental Quality (CEQ) is an executive agency within the Executive office of the President.[5] It is the principal agency responsible for the administration of NEPA. The CEQ has promulgated interpretive NEPA regulations that other federal agencies have generally adopted. NEPA accorded only advisory duties on the CEQ. NEPA gives the CEQ environmental research, review, and reporting responsibilities.

MEPA created the Environmental Quality Council (EQC). The EQC is closely patterned after the CEQ except for a couple of significant variations. First, the EQC is a legislative council as opposed to an executive agency. The EQC is made up of citizen legislators and public at large members who have legislative over-sight responsibility for the implementation of MEPA. As a legislative entity, the Council only has advisory authority when making recommendations to executive branch agencies. Like the CEQ, the EQC has worked with executive branch agencies in promulgation of MEPA administrative rules. The EQC staff is charged with environmental research and reporting responsibilities, appraising various state programs in light of MEPA's policies, documenting and defining changes in the natural environment, and among other duties, assisting legislators with environmental legislation.

---

[2] 42 USC 4331.

[3] 42 USC 4332(E)

[4] 42 USC 4332 (H)

[5] President Clinton has indicated his intent to abolish the CEQ. Abolition of CEQ would require legislation and a transfer of legislative authority to administer NEPA.

Comparing CEQ's NEPA Regulations with the MEPA Model Rules: An Analysis

The 1988 MEPA Model rules were patterned after the CEQ regulations. There are many similarities but also many differences. Utilizing the environmental framework set out in the handbook provides a logical starting point in which to understand and evaluate the CEQ regulations and the MEPA Model rules. The framework consists of five key questions:

(1) **When is environmental review required under NEPA and MEPA?**

(2) **What form will the environmental review take under NEPA and MEPA?**

(3) **How is the environmental review accomplished under NEPA and MEPA?**

(4) **What level of public involvement is required and/or appropriate in the environmental review process under NEPA and MEPA?**

(5) **How is a NEPA or MEPA environmental review document utilized in the decision-making process?**

Asking these questions whenever conducting a joint MEPA/NEPA review should help ensure proper compliance.

When is environmental review required under NEPA and MEPA?

Under MEPA and the Model Rules, if the state agency is not exempt from the MEPA requirements and it proposes a Model Rule broadly defined action that is neither exempt or excluded from MEPA review and that action has a potential impact on the human environment (economic and social impacts by themselves do not trigger the environmental review process), then some form of environmental review is required.

The CEQ NEPA regulations and NEPA case law provide that if the agency is not exempt from NEPA requirements or there is not any unreconcilable statutory conflict or the process which the agency has undertaken is deemed to be functionally equivalent to the NEPA process and the agency's proposal has a potential impact on the human environment (economic and social impacts by themselves do not trigger the environmental review process) and the proposal is not categorically excluded then some form of environmental review is required.

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, AS AMENDED*

An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969."

PURPOSE

SEC. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

SEC. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

---

*Pub. L. 91–190, 42 U.S.C. 4321–4347, January 1, 1970, as amended by Pub. L. 94–52, July 3, 1975, and Pub. L. 94–83, August 9, 1975.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) Identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) The environmental impact of the proposed action,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (c) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) Recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) Initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) Assist the Council on Environmental Quality established by title II of this Act.

SEC. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

SEC. 104. Nothing in section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

SEC. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

SEC. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

SEC. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to

the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

SEC. 203. The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

SEC. 204. It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 of this title;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

SEC. 205. In exercising its powers, functions, and duties under this Act, the Council shall—

(1) Consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order No. 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

(2) Utilize, to the fullest extent possible, the services, facilities and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

SEC. 206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315).

SEC. 207. The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

SEC. 208. The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the sup-

port of international exchange programs in the United States and in foreign countries.

SEC. 209. There are authorized to be appropriated to carry out the provisions of this chapter not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

THE ENVIRONMENTAL QUALITY IMPROVEMENT ACT OF 1970*

TITLE II—ENVIRONMENTAL QUALITY (OF THE WATER QUALITY IMPROVEMENT ACT OF 1974)

SHORT TITLE

SEC. 201. This title may be cited as the "Environmental Quality Improvement Act of 1970."

FINDINGS, DECLARATIONS, AND PURPOSES

SEC. 202. (a) The Congress finds—

(1) That man has caused changes in the environment;

(2) That many of these changes may affect the relationship between man and his environment; and

(3) That population increases and urban concentration contribute directly to pollution and the degradation of our environment.

(b)(1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments.

(3) The Federal Government encourages and supports implementation of this policy through appropriate regional organizations established under existing law.

(c) The purposes of this title are—

(1) To assure that each Federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law; and

(2) To authorize an Office of Environmental Quality, which, notwithstanding any other provision of law, shall provide the professional and administrative staff for the Council on Environmental Quality established by Public Law 91–190.

OFFICE OF ENVIRONMENTAL QUALITY

SEC. 203. (a) There is established in the Executive Office of the President an office to be known as the Office of Environmental Quality (hereafter in this title referred to as the "Office"). The Chairman of the Council on Environmental Quality established by Public Law 91–190 shall be the Director of the Office. There shall be in the Office a Deputy Director who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The compensation of the Deputy Director shall be fixed by the President at a rate not in excess of the annual rate of compensation payable to the Deputy Director of the Bureau of the Budget.

(c) The Director is authorized to employ such officers and employees (including experts and consultants) as may be necessary to enable the Office to carry out its functions under this title and Public Law 91–190, except that he may employ no more than 10 specialists and other experts without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and pay such specialists and experts without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but no such specialist or

---

*Pub. L. 91–224, 42 U.S.C. 4371–4374, April 3, 1970.

expert shall be paid at a rate in excess of the maximum rate for GS–18 of the General Schedule under section 5330 of title 5.

(d) In carrying out his functions the Director shall assist and advise the President on policies and programs of the Federal Government affecting environmental quality by—

(1) Providing the professional and administrative staff and support for the Council on Environmental Quality established by Public Law 91–190;

(2) Assisting the Federal agencies and departments in appraising the effectiveness of existing and proposed facilities, programs, policies, and activities of the Federal Government, and those specific major projects designated by the President which do not require individual project authorization by Congress, which affect environmental quality;

(3) Reviewing the adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources;

(4) Promoting the advancement of scientific knowledge of the effects of actions and technology on the environment and encourage the development of the means to prevent or reduce adverse effects that endanger the health and well-being of man;

(5) Assisting in coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality;

(6) Assisting the Federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established through the Federal Government;

(7) Collecting, collating, analyzing, and interpreting data and information on environmental quality, ecological research, and evaluation.

(e) The Director is authorized to contract with public or private agencies, institutions, and organizations and with individuals without regard to sections 3618 and 3709 of the Revised Statutes (31 U.S.C. 529; 41 U.S.C. 5) in carrying out his functions.

REPORT

SEC. 204. Each Environmental Quality Report required by Public Law 91–190 shall, upon transmittal to Congress, be referred to each standing committee having jurisdiction over any part of the subject matter of the Report.

AUTHORIZATION

SEC. 205. There are hereby authorized to be appropriated not to exceed $500,000 for the fiscal year ending June 30, 1970, not to exceed $750,000 for the fiscal year ending June 30, 1971, not to exceed $1,250,000 for the fiscal year ending June 30, 1972, and not to exceed $1,500,000 for the fiscal year ending June 30, 1973. These authorizations are in addition to those contained in Public Law 91–190.

Approved April 3, 1970.

THE CLEAN AIR ACT § 309*

§ 7609. Policy review

(a) The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal agency action (other than a project for construction) to which section 4332(2)(C) of this title applies, and (3) proposed regulations published by any department or agency of the Federal Government. Such written comment shall be made public at the conclusion of any such review.

(b) In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.

---

*July 14, 1955, c. 360, § 309, as added Dec. 31, 1970, Pub. L. 91-604 § 12(a), 42 U.S.C. § 7609 (1970).

Executive Order 11514. March 5, 1970

PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

As amended by Executive Order 11991. (Secs. 2(g) and (3(h)). May 24, 1977*

By virtue of the authority vested in me as President of the United States and in furtherance of the purpose and policy of the National Environmental Policy Act of 1969 (Public Law No. 91-190, approved January 1, 1970), it is ordered as follows:

Section 1. *Policy.* The Federal Government shall provide leadership in protecting and enhancing the quality of the Nation's environment to sustain and enrich human life. Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals. The Council on Environmental Quality, through the Chairman, shall advise and assist the President in leading this national effort.

Sec. 2. *Responsibilities of Federal agencies.* Consonant with Title I of the National Environmental Policy Act of 1969, hereafter referred to as the "Act", the heads of Federal agencies shall:

(a) Monitor, evaluate, and control on a continuing basis their agencies' activities so as to protect and enhance the quality of the environment. Such activities shall include those directed to controlling pollution and enhancing the environment and those designed to accomplish other program objectives which may affect the quality of the environment. Agencies shall develop programs and measures to protect and enhance environmental quality and shall assess progress in meeting the specific objectives of such activities. Heads of agencies shall consult with appropriate Federal, State and local agencies in carrying out their activities as they affect the quality of the environment.

(b) Develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action. Federal agencies shall also encourage State and local agencies to adopt similar procedures for informing the public concerning their activities affecting the quality of the environment.

(c) Insure that information regarding existing or potential environmental problems and control methods developed as part of research, development, demonstration, test, or evaluation activities is made available to Federal agencies, States, counties, municipalities, institutions, and other entities, as appropriate.

---

*The Preamble to Executive Order 11991 is as follows:

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in furtherance of the purpose and policy of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), the Environmental Quality Improvement Act of 1970 (42 U.S.C. 4371 *et seq.*), and Section 309 of the Clean Air Act, as amended (42 U.S.C. 1857h-7), it is hereby ordered as follows:

(d) Review their agencies' statutory authority, administrative regulations, policies, and procedures, including those relating to loans, grants, contracts, leases, licenses, or permits, in order to identify any deficiencies or inconsistencies therein which prohibit or limit full compliance with the purposes and provisions of the Act. A report on this review and the corrective actions taken or planned, including such measures to be proposed to the President as may be necessary to bring their authority and policies into conformance with the intent, purposes, and procedures of the Act, shall be provided to the Council on Environmental Quality not later than September 1, 1970.

(e) Engage in exchange of data and research results, and cooperate with agencies of other governments to foster the purposes of the Act.

(f) Proceed, in coordination with other agencies, with actions required by section 102 of the Act.

(g) In carrying out their responsibilites under the Act and this Order, comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements.

Sec. 3. *Responsibilities of Council on Environmental Quality.* The Council on Environmental Quality shall:

(a) Evaluate existing and proposed policies and activities of the Federal Government directed to the control of pollution and the enhancement of the environment and to the accomplishment of other objectives which affect the quality of the environment. This shall include continuing review of procedures employed in the development and enforcement of Federal standards affecting environmental quality. Based upon such evaluations the Council shall, where appropriate, recommend to the President policies and programs to achieve more effective protection and enhancement of environmental quality and shall, where appropriate, seek resolution of significant environmental issues.

(b) Recommend to the President and to the agencies priorities among programs designed for the control of pollution and for enhancement of the environment.

(c) Determine the need for new policies and programs for dealing with environmental problems not being adequately addressed.

(d) Conduct, as it determines to be appropriate, public hearings or conferences on issues of environmental significance.

(e) Promote the development and use of indices and monitoring systems (1) to assess environmental conditions and trends, (2) to predict the environmental impact of proposed public and private actions, and (3) to determine the effectiveness of programs for protecting and enhancing environmental quality.

(f) Coordinate Federal programs related to environmental quality.

(g) Advise and assist the President and the agencies in achieving international cooperation for dealing with environmental problems, under the foreign policy guidance of the Secretary of State.

(h) Issue regulations to Federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332(2)). Such regulations shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. They will be designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives. They will require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses. The Council shall include in its regulations procedures (1) for the early preparation of environmental impact statements, and (2) for the referral to the Council of conflicts between agencies concerning the implementation of the National Environmental Policy Act of 1969, as amended, and

Section 309 of the Clean Air Act, as amended, for the Council's recommendation as to their prompt resolution.

(i) Issue such other instructions to agencies, and request such reports and other information from them, as may be required to carry out the Council's responsibilities under the Act.

(j) Assist the President in preparing the annual Environmental Quality Report provided for in section 201 of the Act.

(k) Foster investigations, studies, surveys, research, and analyses relating to (i) ecological systems and environmental quality, (ii) the impact of new and changing technologies thereon, and (iii) means of preventing or reducing adverse effects from such technologies.

Sec. 4. *Amendments of E.O. 11472.* Executive Order No. 11472 of May 29, 1969, including the heading thereof, is hereby amended:

(1) By substituting for the term "the Environmental Quality Council", wherever it occurs, the following: "the Cabinet Committee on the Environment".

(2) By substituting for the term "the Council", wherever it occurs, the following: "the Cabinet Committee".

(3) By inserting in subsection (f) of section 101, after "Budget,", the following: "the Director of the Office of Science and Technology,".

(4) By substituting for subsection (g) of section 101 the following:

"(g) The Chairman of the Council on Environmental Quality (established by Public Law 91-190) shall assist the President in directing the affairs of the Cabinet Committee."

(5) by deleting subsection (c) of section 102.

(6) By substituting for "the Office of Science and Technology", in section 104, the following: "the Council on Environmental Quality (established by Public Law 91-190)".

(7) By substituting for "(hereinafter referred to as the 'Committee')", in section 201, the following: "(hereinafter referred to as the 'Citizens' Committee')".

(8) By substituting for the term "the Committee", wherever it occurs, the following: "the Citizens' Committee".

☆ U.S. GOVERNMENT PRINTING OFFICE:1991-517-013/46563

Council on Environmental Quality
Executive Office of the President

REGULATIONS

For Implementing The Procedural Provisions Of The

NATIONAL ENVIRONMENTAL POLICY ACT

Reprint
40 CFR Parts 1500–1508
(as of July 1, 1986)

CONTENTS

	Page
Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act	1
The National Environmental Policy Act of 1969, as Amended	35
The Environmental Quality Improvement Act of 1970	40
The Clean Air Act § 309	42
Executive Order 11514, as Amended by Executive Order 11991	43

For further information, contact:
General Counsel
Council on Environmental Quality
Executive Office of the President
722 Jackson Pl. N.W.
Washington, D.C. 20503
(202) 395-5754

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

TABLE OF CONTENTS

PART 1500—PURPOSE, POLICY, AND MANDATE

Sec.
1500.1 Purpose.
1500.2 Policy.
1500.3 Mandate.
1500.4 Reducing paperwork.
1500.5 Reducing delay.
1500.6 Agency authority.

PART 1501—NEPA AND AGENCY PLANNING

1501.1 Purpose.
1501.2 Apply NEPA early in the process.
1501.3 When to prepare an environmental assessment.
1501.4 Whether to prepare an environmental impact statement.
1501.5 Lead agencies.
1501.6 Cooperating agencies.
1501.7 Scoping.
1501.8 Time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

1502.1 Purpose.
1502.2 Implementation.
1502.3 Statutory requirements for statements.
1502.4 Major Federal actions requiring the preparation of environmental impact statements.
1502.5 Timing.
1502.6 Interdisciplinary preparation.
1502.7 Page limits.
1502.8 Writing.
1502.9 Draft, final, and supplemental statements.
1502.10 Recommended format.
1502.11 Cover sheet.
1502.12 Summary.
1502.13 Purpose and need.
1502.14 Alternatives including the proposed action.
1502.15 Affected environment.
1502.16 Environmental consequences.
1502.17 List of preparers.
1502.18 Appendix.
1502.19 Circulation of the environmental impact statement.
1502.20 Tiering.
1502.21 Incorporation by reference.
1502.22 Incomplete or unavailable information.
1502.23 Cost-benefit analysis.
1502.24 Methodology and scientific accuracy.
1502.25 Environmental review and consultation requirements.

PART 1503—COMMENTING

1503.1 Inviting comments.
1503.2 Duty to comment.
1503.3 Specificity of comments.
1503.4 Response to comments.

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

1504.1 Purpose.
1504.2 Criteria for referral.
1504.3 Procedure for referrals and response.

PART 1505—NEPA AND AGENCY DECISIONMAKING

1505.1 Agency decisionmaking procedures.
1505.2 Record of decision in cases requiring environmental impact statements.
1505.3 Implementing the decision.

PART 1506—OTHER REQUIREMENTS OF NEPA

1506.1 Limitations on actions during NEPA process.
1506.2 Elimination of duplication with State and local procedures.
1506.3 Adoption.
1506.4 Combining documents.
1506.5 Agency responsibility.
1506.6 Public involvement.
1506.7 Further guidance.
1506.8 Proposals for legislation.
1506.9 Filing requirements.
1506.10 Timing of agency action.
1506.11 Emergencies.
1506.12 Effective date.

PART 1507—AGENCY COMPLIANCE

1507.1 Compliance.
1507.2 Agency capability to comply.
1507.3 Agency procedures.

PART 1508—TERMINOLOGY AND INDEX

1508.1 Terminology.
1508.2 Act.

Sec.
1508.3 Affecting.
1508.4 Categorical exclusion.
1508.5 Cooperating agency.
1508.6 Council.
1508.7 Cumulative impact.
1508.8 Effects.
1508.9 Environmental assessment.
1508.10 Environmental document.
1508.11 Environmental impact statement.
1508.12 Federal agency.
1508.13 Finding of no significant impact.
1508.14 Human environment.
1508.15 Jurisdiction by law.
1508.16 Lead agency.
1508.17 Legislation.
1508.18 Major Federal action.
1508.19 Matter.
1508.20 Mitigation.
1508.21 NEPA process.
1508.22 Notice of intent.
1508.23 Proposal.
1508.24 Referring agency.
1508.25 Scope.
1508.26 Special expertise.
1508.27 Significantly.
1508.28 Tiering.
Index.

PART 1500—PURPOSE, POLICY, AND MANDATE

Sec.
1500.1 Purpose.
1500.2 Policy.
1500.3 Mandate.
1500.4 Reducing paperwork.
1500.5 Reducing delay.
1500.6 Agency authority.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions

of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 et seq.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(d) Writing environmental impact statements in plain language (§ 1502.8).

(e) Following a clear format for environmental impact statements (§ 1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(h) Summarizing the environmental impact statement (§ 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).

(j) Incorporating by reference (§ 1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(l) Requiring comments to be as specific as possible (§ 1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(o) Combining environmental documents with other documents (§ 1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

[43 FR 55990, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

1501.1 Purpose.
1501.2 Apply NEPA early in the process.
1501.3 When to prepare an environmental assessment.
1501.4 Whether to prepare an environmental impact statement.
1501.5 Lead agencies.
1501.6 Cooperating agencies.
1501.7 Scoping.
1501.8 Time limits.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1508.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may re-

quest the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b) (3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§ 1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the FEDERAL REGISTER except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501.8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided*, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

1502.1 Purpose.
1502.2 Implementation.
1502.3 Statutory requirements for statements.
1502.4 Major Federal actions requiring the preparation of environmental impact statements.
1502.5 Timing.
1502.6 Interdisciplinary preparation.
1502.7 Page limits.
1502.8 Writing.
1502.9 Draft, final, and supplemental statements.
1502.10 Recommended format.
1502.11 Cover sheet.
1502.12 Summary.
1502.13 Purpose and need.
1502.14 Alternatives including the proposed action.
1502.15 Affected environment.
1502.16 Environmental consequences.
1502.17 List of preparers.
1502.18 Appendix.
1502.19 Circulation of the environmental impact statement.
1502.20 Tiering.
1502.21 Incorporation by reference.
1502.22 Incomplete or unavailable information.

Sec.

1502.23 Cost-benefit analysis.
1502.24 Methodology and scientific accuracy.
1502.25 Environmental review and consultation requirements.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in Part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in Part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected environment.

(g) Environmental consequences (especially sections 102(2)(C) (i), (ii), (iv), and (v) of the Act).

(h) List of preparers.

(i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate

the discussions of those elements required by sections 102(2)(C) (i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the re-

quirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1966]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING

Sec.

1503.1 Inviting comments.
1503.2 Duty to comment.
1503.3 Specificity of comments.
1503.4 Response to comments.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55997, Nov. 29, 1978, unless otherwise noted.

§ 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A-95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10.

§ 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or entitlements.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a) (4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with

a new cover sheet shall be filed as the final statement (§ 1506.9).

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.
1504.1 Purpose.
1504.2 Criteria for referral.
1504.3 Procedure for referrals and response.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55998, Nov. 29, 1978, unless otherwise noted.

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of Federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is "unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council (hereafter "environmental referrals").

(c) Under section 102(2)(C) of the Act other Federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

§ 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies.

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

§ 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency's comments on the draft environmental impact statement, except when the statement does not contain adequate information to permit an assessment of the matter's environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) of this section.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts,

(ii) Identify any existing environmental requirements or policies which would be violated by the matter,

(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory,

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason,

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than twenty-five (25) days after the referral to the Council the lead agency may deliver a response to the Council, and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral.

(2) Be supported by evidence.

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Interested persons (including the applicant) may deliver their views in writing to the Council. Views in support of the referral should be delivered not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f) (2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).

[43 FR 55998, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.
1505.1 Agency decisionmaking procedures.
1505.2 Record of decision in cases requiring environmental impact statements.
1505.3 Implementing the decision.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C.

7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55999, Nov. 29, 1978, unless otherwise noted.

§ 1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6 (c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

1506.1 Limitations on actions during NEPA process.
1506.2 Elimination of duplication with State and local procedures.
1506.3 Adoption.
1506.4 Combining documents.
1506.5 Agency responsibility.
1506.6 Public involvement.
1506.7 Further guidance.
1506.8 Proposals for legislation.
1506.9 Filing requirements.
1506.10 Timing of agency action.
1506.11 Emergencies.
1506.12 Effective date.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (*e.g.* long leadtime equipment and purchase options) made by nongovernmental entities seeking loan guarantees from the Administration.

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In

such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law,

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under Part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor.* An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

§ 1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:

(1) Research activities;

(2) Meetings and conferences related to NEPA; and

(3) Successful and innovative procedures used by agencies to implement NEPA.

§ 1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§ 1506.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided,* That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10.

(i) A Congressional Committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 et seq.) and the Wilderness Act (16 U.S.C. 1131 et seq.)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Filing requirements.

Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities (A-104), 401 M Street SW., Washington, D.C. 20460. Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.10.

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see § 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 58000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under section 102(2)(D) of the Act or under sec. 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these

regulations. No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

PART 1507—AGENCY COMPLIANCE

Sec.
1507.1 Compliance.
1507.2 Agency capability to comply.
1507.3 Agency procedures.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56002, Nov. 29, 1978, unless otherwise noted.

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. Agencies shall designate a person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by section 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of section 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

§ 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the FEDERAL REGISTER, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the FEDERAL REGISTER for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in § 1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by § 1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.
1508.1 Terminology.
1508.2 Act.
1508.3 Affecting.
1508.4 Categorical exclusion.
1508.5 Cooperating agency.
1508.6 Council.
1508.7 Cumulative impact.
1508.8 Effects.
1508.9 Environmental assessment.
1508.10 Environmental document.
1508.11 Environmental impact statement.
1508.12 Federal agency.
1508.13 Finding of no significant impact.
1508.14 Human environment.
1508.15 Jurisdiction by law.
1508.16 Lead agency.
1508.17 Legislation.
1508.18 Major Federal action.
1508.19 Matter.
1508.20 Mitigation.
1508.21 NEPA process.
1508.22 Notice of intent.
1508.23 Proposal.
1508.24 Referring agency.
1508.25 Scope.
1508.26 Special expertise.
1508.27 Significantly.
1508.28 Tiering.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

"Act" means the National Environmental Policy Act, as amended (42 U.S.C. 4321, et seq.) which is also referred to as "NEPA."

§ 1508.3 Affecting.

"Affecting" means will or may have an effect on.

§ 1508.4 Categorical exclusion.

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

"Cooperating agency" means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

"Council" means the Council on Environmental Quality established by Title II of the Act.

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

"Environmental assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

"Environmental document" includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

"Environmental impact statement" means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

"Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

"Finding of no significant impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

"Jurisdiction by law" means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

"Lead agency" means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to

Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

"Matter" includes for purposes of Part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

"NEPA process" means all measures necessary for compliance with the requirements of section 2 and Title I of NEPA.

§ 1508.22 Notice of intent.

"Notice of intent" means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

"Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

"Referring agency" means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include: (1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

"Special expertise" means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency

believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

INDEX

Act	1508.2.
Action	1508.18, 1508.25.
Action-forcing	1500.1, 1502.1.
Adoption	1500.4(n), 1500.5(h), 1508.3.
Affected Environment	1502.10(f), 1502.15.
Affecting	1502.3, 1508.3.
Agency Authority	1500.6.
Agency Capability	1501.2(a), 1507.2.
Agency Compliance	1507.1.
Agency Procedures	1505.1, 1507.3.
Agency Responsibility	1506.5.
Alternatives	1501.2(c), 1502.2, 1502.10(e), 1502.14, 1505.1(a), 1505.2, 1507.2(d), 1508.25(b).
Appendices	1502.10(k), 1502.18, 1502.24.
Applicant	1501.2(d)(1), 1501.4(b), 1501.6(a), 1502.19(b), 1503.1(a)(3), 1504.3(a), 1506.1(d), 1506.5(a), 1506.5(b).
Apply NEPA Early in the Process.	1501.2.
Categorical Exclusion	1500.4(p), 1500.5(k), 1501.4(a), 1507.3(b), 1508.4.
Circulating of Environmental Impact Statement.	1502.18, 1506.3.
Classified Information	1507.3(c).
Clean Air Act	1504.1, 1506.19(a).
Combining Documents	1500.4(o), 1500.5(l), 1508.4.
Commenting	1502.19, 1503.1, 1503.2, 1503.3, 1503.4, 1506.6(f).
Consultation Requirement	1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25.
Content	1508.27(a).
Cooperating Agency	1500.5(b), 1501.1(b), 1501.5(c), 1501.5(f), 1501.6, 1503.1(a)(1), 1503.2, 1503.3, 1506.3(c), 1508.5(a), 1508.6.
Cost-Benefit	1502.23.
Council on Environmental Quality	1500.3, 1501.5(e), 1501.5(f), 1501.6(c), 1502.9(c)(4), 1504.1, 1504.2, 1504.3, 1506.6(f), 1506.6, 1506.10(e), 1506.11, 1507.3, 1508.6, 1508.24.
Cover Sheet	1502.10(a), 1502.11.
Cumulative Impact	1508.7, 1508.25(e), 1508.25(c).
Decisionmaking	1505.1, 1506.1.
Decision points	1506.1(b).
Dependent	1508.25(e).
Draft Environmental Impact Statement.	1502.9(e).
Early Application of NEPA	1501.2.
Economic Effects	1508.8.
Effective Date	1506.12.
Effects	1502.16, 1508.8.
Emergencies	1506.11.
Endangered Species Act	1502.25, 1508.27(b)(9).
Energy	1502.16(a).
Environmental Assessment	1501.3, 1501.4(b), 1501.4(c), 1501.7(b)(3), 1506.2(b)(4), 1506.5(b), 1508.4, 1508.9, 1508.10, 1508.13.
Environmental Consequences.	1502.10(g), 1502.16.
Environmental Consultation Requirements.	1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25, 1503.3(c).
Environmental Documents	1508.10.
Environmental Impact Statement.	1500.4, 1501.4(c), 1501.7, 1501.3, 1502.1, 1502.2, 1502.3, 1502.4, 1502.5, 1502.6, 1502.7, 1502.8, 1502.9, 1502.10, 1502.11, 1502.12, 1502.13, 1502.14, 1502.15, 1502.16, 1502.17, 1502.18, 1502.19, 1502.20, 1502.21, 1502.22, 1502.23, 1502.24, 1502.25, 1506.2(b)(4), 1506.3, 1506.8, 1508.11.
Environmental Protection Agency.	1502.11(f), 1504.1, 1504.3, 1506.7(c), 1508.8, 1508.10, 1508.19(a).
Environmental Review Requirements.	1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25, 1503.3(c).
Expediter	1501.8(b)(2).
Federal Agency	1508.12.
Filing	1506.9.
Final Environmental Impact Statement.	1502.9(b), 1502.1, 1503.4(b).
Finding of No Significant Impact.	1500.3, 1500.4(q), 1500.5(i), 1501.4(e), 1508.13.
Fish and Wildlife Coordination Act.	1502.25.
Format for Environmental Impact Statement.	1502.10.
Freedom of Information Act	1506.6(f).
Further Guidance	1506.7.
Generic	1502.4(c)(2).
General Services Administration.	1506.8(b)(5).
Geographic	1502.4(c)(1).
Graphics	1502.8.
Handbook	1506.7(a).
Housing and Community Development Act.	1506.12, 1506.12.
Human Environment	1502.3, 1502.22, 1506.14.
Impacts	1508.8, 1508.25(c).
Implementing the Decision	1506.3.
Incomplete or Unavailable Information.	1502.22.
Incorporation by Reference	1500.4(j), 1502.21.
Index	1502.10(j).
Indian Tribes	1501.2(d)(2) 1501.7(a)(1), 1502.15(c), 1503.1(a)(2)(ii), 1506.8(b)(3)(ii), 1508.5, 1508.12.
Intensity	1508.27(b).
Interdisciplinary Preparation	1502.6, 1502.17.
Interim Actions	1506.1.
Joint Lead Agency	1501.5(b), 1508.2.
Judicial Review	1500.3.
Jurisdiction by Law	1508.15.
Lead Agency	1500.5(c), 1501.1(c), 1501.8, 1501.6, 1501.7, 1501.8, 1504.3, 1506.2(b)(4), 1508.6(a), 1508.10(a), 1508.16.
Legislation	1500.5(j), 1502.3, 1506.8, 1506.17, 1508.18(a).
Limitation on Action During NEPA Process.	1506.1.
List of Preparers	1502.10(h), 1502.17.

Local or State	1500.4(n), 1500.5(h), 1501.2(d)(2), 1501.5(b), 1501.5(d), 1501.7(a)(1), 1501.8(c), 1502.16(c), 1503.1(a)(2), 1506.2(b), 1506.6(b)(3), 1508.5, 1508.12, 1508.16.
Major Federal Action	1502.3, 1506.16.
Mandate	1500.3.
Matter	1504.1, 1504.2, 1504.3, 1508.19.
Methodology	1502.24.
Mitigation	1502.14(h), 1502.16(h), 1503.3(d), 1505.2(c), 1505.3, 1506.20.
Monitoring	1506.2(c), 1506.3.
National Historic Preservation Act.	1502.25.
National Register of Historical Places.	1508.27(b)(8).
Natural or Depletable Resource Requirements.	1502.16(f).
Need for Action	1502.10(d), 1502.13.
NEPA Process	1506.21.
Non-Federal Sponsor	1501.2(d).
Notice of Intent	1501.7, 1507.3(e), 1508.22.
OMB Circular A-95	1503.1(a)(2)(iii), 1505.2, 1506.6(b)(3)(i).
102 Monitor	1506.6(b)(2), 1506.7(c).
Ongoing Activities	1506.12.
Page Limits	1500.4(e), 1501.7(b), 1502.7.
Planning	1500.5(e), 1501.2(b), 1502.4(a), 1506.16.
Policy	1500.2, 1502.4(b), 1506.16(a).
Program Environmental Impact Statement.	1500.4(i), 1502.4, 1502.20, 1508.18.
Programs	1502.4, 1506.16(b).
Projects	1506.16.
Proposal	1502.4, 1502.5, 1506.8, 1508.23.
Proposed Action	1502.10(e), 1502.14, 1506.2(c).
Public Health and Welfare	1504.1.
Public Involvement	1501.4(e), 1503.1(a)(3), 1506.6.
Purpose	1500.1, 1501.1, 1502.1, 1504.1.
Purpose of Action	1502.10(d), 1502.13.
Record of Decision	1505.2, 1506.1.
Referrals	1504.1, 1504.2, 1504.3, 1506.3(d).
Referring Agency	1504.1, 1504.2, 1504.3.
Response to Comments	1503.4.
Rural Electrification Administration.	1506.1(d).
Scientific Accuracy	1502.24.
Scope	1502.4(a), 1502.9(a), 1506.25.
Scoping	1500.4(b), 1501.1(d), 1501.4(d), 1501.7, 1502.9(e), 1506.8(a).
Significantly	1502.3, 1506.27.
Similar	1506.25.
Small Business Associations	1506.6(b)(3)(vi).
Social Effects	1506.8.
Special Expertise	1506.26.
Specificity of Comments	1500.4(1), 1503.3.
State and Areawide Clearinghouses	1501.4(e)(2), 1503.1(e)(2)(iii), 1506.6(b)(3)(i).
State and Local	1500.4(n), 1500.5(h), 1501.2(d)(2), 1501.5(b), 1501.5(d), 1501.7(e)(1), 1501.8(c), 1502.16(c), 1503.1(e)(2), 1506.2(b), 1506.6(b)(3), 1508.5, 1508.12, 1508.16.
State and Local Fiscal Assistance Act.	1506.18(a).
Summary	1500.4(h), 1502.10(b), 1502.12.
Supplements to Environmental Impact Statements.	1502.9(c).
Table of Contents	1502.10(c).
Technological Development	1502.4(c)(3).
Terminology	1506.1.
Tiering	1500.4(i), 1502.4(d), 1502.20, 1506.28.
Time Limits	1500.5(e), 1501.1(e), 1501.7(b)(2), 1501.8.
Timing	1502.4, 1502.5, 1506.10.
Treaties	1506.17.
When to Prepare an Environmental Impact Statement.	1501.3
Wild and Scenic Rivers Act	1506.6(b)(ii).
Wilderness Act	1506.6(b)(ii).
Writing	1502.

INDEX—Continued

NEPA REGULATIONS OF APPLICABLE FEDERAL AGENCIES

ADVISORY COUNCIL ON HISTORIC PRESERVATION, 36 C.F.R. Part 805

DEPARTMENT OF AGRICULTURE, 7 C.F.R. Part 3100; 7 C.F.R. Part 1b
- Agricultural Research Service, 7 C.F.R. Part 520
- Agriculture Stabilization and Conservation Program Service, 7 C.F.R. Part 799
- Animal and Plant Health Inspection Service, 44 Fed. Reg. 50381 (1979)
- Cooperative State Research Service, 56 Fed. Reg. 8156 (1991)
- Farmers Home Administration, 7 C.F.R. Parts 1901, 1940
- Forest Service, 36 C.F.R. Part 219, FS Manual Chpter. 1950
- Soil Conservation Service, 7 C.F.R. Part 650
- Rural Electrification Administration, 7 C.F.R. 1794; Dir. 17.02-2

DEPARTMENT OF COMMERCE, 45 Fed. Reg. 47898 (1980); Dept. Admin. Order 216-6
- Economic Development Administration, 45 Fed. Reg. 63310 (1980), amended by 45 Fed. Reg. 74902(1980); Dir. 17.02-2
- National Oceanic and Atmospheric Administration, 48 Fed. Reg. 14734 (1983); NOAA Directives Manual 2-10, Environmental Review Procedures, July 23, 1984

DEPARTMENT OF DEFENSE, 32 C.F.R. Part 214, 32 C.F.R. Part 197
- Department of the Air Force, 32. C.F.R. Part 989
- Army Corps of Engineers, 33 C.F.R. Part 230, 32 C.F.R. Chapter II
- Department of the Army, 32 C.F.R. Parts 650, 651
- Department of the Navy, 32 C.F.R. Part 775

DEPARTMENT OF ENERGY, 45 Fed. Reg. 20694, (1980), amended by 47 Fed. Reg. 7976 (1982), 48 Fed. Reg 685 (1983), 52 Fed. Reg. 659 (1987), 52 Fed. Reg. 47662 (1987) Coal Utilization Program, 10 C.F.R. Part 305

DEPARTMENT OF HEALTH AND HUMAN SERVICES, HHS Gen. Admin. Manual; 45 Fed Reg. 76519 (1980), amended by 47 Fed. Reg. 2414 (1982)

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, 24 C.F.R. Part 50, 51, 58
- Housing and Community Development Act, 24 C.F.R. Part 50, 58
- Community Development Block Grant Program, 24 C.F.R. 58

DEPARTMENT OF THE INTERIOR, 516 Departmental Manual 1-7; 45 Fed. Reg. 27541 (1980), amended by 49 Fed. Reg. 21437 (1984)
- Bureau of Indian Affairs, 30 BIAM Supplement 1, NEPA Handbook; 46 Fed. Reg. 7490 (1981)
- Bureau of Mines, 516 WBM 1-5, Environmental Quality-- National Environmental Policy Act of 1969 (March 29, 1990);

DEPARTMENT OF INTERIOR Continued
45 Fed. Reg. 85528 (1980)
Fish and Wildlife Service, Service Admin. Manual, 30 AM 2-4; 45 Fed. Reg. 47941 (1980), amended by 47 Fed. Reg. 28841 (1982), 49 Fed. Reg. 7881 (1984)
Geological Survey, 46 Fed. Reg. 7485 (1981)
Mineral Management Service, 51 Fed. Reg. 1855 (1986)
National Park Service, NPS-12, NEPA Compliance Guideline; 46 Fed Reg. 1042 (1981)
Office of Surface Mining, Reclamation and Control, OMRE NEPA Handbook on Procedures for Implementing the National Environmental Policy Act
Bureau of Reclamation, National Environmental Policy Act Handbook, October, 1990; 45 Fed. Reg. 47944 (1980), amended by 48 Fed. Reg. 17151 (1983)

DEPARTMENT OF JUSTICE, 28 C.F.R. part 61
Drug Enforcement Agency, 28 C.F.R. Part 61, Appendix B
Immigration and Naturalization Service, 28 C.F.R. Part 61, App. D
Bureau of Prisons, 28 C.F.R. Part 61, Appendix A
Office of Justice, Assistance, Research and Statistics, 28 C.F.R. Part 61, Appendix C

DEPARTMENT OF LABOR, 29 C.F.R. Part 11

DEPARTMENT OF TRANSPORTATION, Order DOT 5610.1c; 44 Fed. Reg. 56420 (1979)
Coast Guard, Commandant Instruction M 16475.1B July 12, 1985; 45 Fed Reg. 32816 (1980), amended by 50 Fed. Reg. 32944 (1985)
Federal Aviation Administration, Order FAA 1050.1D (agency-wide order); FAA 5050.41, Airport Environmental Handbook, October 8 1985 (applies to airport grant program only; 45 Fed. Reg. 2244 (1980), as amended by 49 Fed. Reg. 28501 (1984)
Federal Highway Administration, 23 C.F.R. Parts 650, 771
Federal Railroad Administration, Procedures for Considering Environmental Impacts; 45 Fed. Reg. 40854 (1980)
Maritime Administration, Maritime Administrative Order 600.1, July 1985
National Highway Traffic Safety Administration, 49 C.F.R. Part 520

ENVIRONMENTAL PROTECTION AGENCY, 40 C.F.R. Part 6, Part 227

FARM CREDIT ADMINISTRATION, 12 C.F.R. Chapter VI

FEDERAL COMMUNICATIONS COMMISSION, 47 C.F.R. Part I, subpart I

FEDERAL EMERGENCY MANAGEMENT AGENCY, 44 C.F.R. Part 10

FEDERAL ENERGY REGULATORY COMMISSION, 18 C.F.R. Part 2.80, Part 380

GENERAL SERVICES ADMINISTRATION, PBS P 1094.4B, Preparation of Environmental Assessments and Environmental Impact Statements; 50 Fed. Reg. 7648 (1985)

INTERNATIONAL BOUNDARY AND WATER COMMISSION, 46 Fed. Reg. 44083 (1981)

INTERSTATE COMMERCE COMMISSION, 49 C.F.R. Part 1105, amended by 54 Fed. Reg. 9822 (1989)

NATIONAL INSTITUTES OF HEALTH, Gen. Adm. Manual, 30-10

NATIONAL SCIENCE FOUNDATION, 45 C.F.R. Part 640

NUCLEAR REGULATORY COMMISSION, 10 C.F.R. Part 51

SMALL BUSINESS ADMINISTRATION, 45 Fed. Reg. 7358 (1980)

VETERAN'S ADMINISTRATION, 38 C.F.R.Part 26

WATER RESOURCES COUNCIL, 18 C.F.R. Part 707

APPENDIX F
MEPA Supreme Court Case Law

This Appendix compiles what little MEPA Montana Supreme Court case law exists. Also included are all of the Montana Attorney General opinions. As a cautionary note, do not rely on this appendix for legal authority. Obtain copies of the official versions of each case and opinion at the State Law Library.

APPENDIX F INDEX

MONTANA SUPREME COURT MEPA CASE LAW

NORTH FORK PRESERVATION ASS. v. DSL, 238 Mont. 451 (1989)
* EQC Summary . . . . . F - 2
* Case . . . . . F - 5

MONTANA WILDERNESS ASS. v. BOARD OF NATURAL RESOURCES, 214 Mont. 82 (1984)
* EQC Summary . . . . . F - 10
* Case . . . . . F - 16

KADILLAK v. THE ANACONDA COMPANY, 198 Mont. 70 (1982)
* EQC Summary . . . . . F - 31
* Case . . . . . F - 33

MONTANA WILDERNESS ASS v. BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES, 171 Mont. 477 (1976)
* EQC Summary . . . . . F - 39
* Case . . . . . F - 41

MONTANA ATTORNEY GENERAL MEPA OPINIONS

42 Op. Atty. Gen. No. 62 (1988), Keith C. Kelly, Director of Agriculture . . . . . F - 58

43 Op. Atty. Gen. No. 63 (1990, Michael J. Mulroney . . . . . F - 62

BRIEF: (Do not cite!!!!!!)

North Fork Preservation Association v. Department of State Lands, 778 P.2d 862 (1989)

FACTS:

In 1985, the North Fork Preservation Association (North Fork) challenged the Department of State Lands (DSL) approval of an oil and gas lessee's (Cennex) operating plan which called for drilling of an exploratory well on a leased tract of school trust land in the Coal Creek State Forest.

The Department originally received applications for oil and gas leases on 14 tracts in the Coal Creek State Forest in 1975. The Department issued an EIS in 1976, permitting leasing of all 14 Coal Creek tracts. The Board of Land Commissioners subsequently rejected all of the bids that were received.

In 1982, the Department received new applications for oil and gas leases covering a larger portion of the Coal Creek State Forest. DSL conducted a preliminary environmental review (PER) to determine whether the issuance of oil and gas leases would be an action by state government that significantly affected the quality of the human environment thus necessitating an EIS. The PER was issued in 1983 and concluded that no significant impacts would result if specific protective stipulations were included in any subsequent lease.

The Department then publicly auctioned off the leases. Cenex purchased leases to 17 tracts within the Coal Creek State Forest. Each leased contained 16 environmentally protective stipulations. Pursuant to these stipulations, Cenex was required to submit an annual operating plan to DSL detailing any activities to be carried out on the leased tract during the upcoming year. Cenex was prohibited from taking any action until written approval of each year's plan was received from the Department.

In 1984, Cenex submitted its first annual operating plan proposing to drill an exploratory well on one of the leased tracts. The Department conducted a site specific PER. After two public hearings and reviewing comments received on the PER during a 30 day review period, DSL issued a supplemental PER. The Department then approved Cenex's plan subject to 31 additional protective stipulations.

North Fork subsequently challenged the Department's approval alleging that DSL failed to prepare an environmental impact statement (EIS) on proposed well as required by law. North Fork asked for a summary judgement. The District Court granted North Fork's motion and subsequently entering judgment in North Fork's favor.

MEPA ISSUES:

(1) Did the District Court apply the proper standard of judicial review to the Department's decision to approve Cennex's annual operating plan?

(2) Did the Department proceed properly in approving Cenex's annual operating permit?

A. Was the Department's decision unlawful when it made the decision not to conduct an EIS at the stage of drilling an exploratory oil well? Furthermore, was Department's action unlawful because it failed to evaluate cumulative impacts as required by its own rules?

B. Was the Department's decision arbitrary or capricious when it failed to prepare an EIS prior to approval of the Cennex annual operating plan?

(3) Is mandamus an appropriate remedy to enforce provisions of the Montana Environmental Policy Act?

HOLDING:

(1) The District Court incorrectly applied the "clearly erroneous" standard under the Montana Administrative Procedures Act (MAPA). The Court's standard of review to the Department's decision to approve Cennex's annual operating plan is not governed by MAPA because there was no "contested case"--no hearing was requested or held before the Department. Looking to federal case law, the Court noted that where a decision involves expertise not possessed by the courts and is part of a duty assigned to the agency, not the courts, the standard of review to be applied is whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully.

(2) A. The Department's decision not to conduct an EIS at the stage of drilling an exploratory well was not unlawful. To determine whether the Department's action was unlawful the Court reviewed the record to see if any statute or regulation had been violated. The Court noted that the department has a statutory fiduciary duty to maximize the return on state trust lands. The procedures in the Department's dealings with Cenex are governed in part by MEPA and the Department's Administrative Rules.

The District court incorrectly concluded that full field development of oil and gas in the Coal Creek area was but one of a number of successive steps set into irreversible motion by the issuance of a lease thus requiring the preparation of an EIS. The Supreme Court noted that overall impacts of full-field development are not at issue in this case--the proposed project/action under consideration is the drilling of one exploratory well on one lease tract. Looking again to federal precedent, the Court noted that an EIS is required at the point of permitting oil and gas development only at the "go/no go" stage of oil and gas development. If the proposed action entails an irretrievable commitment of resources then an EIS is required.

The Court agreed with North Fork in that the lease could ultimately empower Cenex to conduct a number of activities that potentially may have a significant effect on the environment. However, referring to the language of the lease, the Court noted that Cenex cannot carry out any activities which would disturb the ground in anyway without prior written approval of the Department. The issuance of this lease therefore, was not an irretrievable commitment of resources--No EIS was required. The Court said that it cannot assume that DSL "will not comply with its MEPA obligations if development proceeds beyond this stage."

The District Court was also incorrect in concluding that the Department's 1984 PER on the single exploration well was insufficient because it failed to adequately evaluate the cumulative impacts of the proposed action. The Department's administrative rules define cumulative impacts as:

> ...impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic

type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures.

The proposed action under consideration in the 1984 PER was the drilling of the test well. The only past related action was the issuance of the leases to Cenex, which was the 1983 PER analyzed. Full-field development of oil and gas is not a related future action because those activities were not under "concurrent consideration" by the Department. The Court held that the 1983 and 1984 PERs sufficiently analyzed the cumulative impacts.

(2) B. The Department's decision to prepare a PER instead of an EIS prior to approval of the Cennex annual operating plan was not arbitrary or capricious. In reviewing the Department's decision the Court deferred to the agency's expertise noting that the reviewing court should not substitute its judgement for that of the agency by determining whether its decision was "correct". The reviewing court must examine the agency's "decision to see whether the information set out in the PER's was considered, or the decision to forego an EIS was so at odds with that information that it could be characterized as arbitrary or the product of caprice." The Court noted that the PER's documented the impacts, utilized interdisciplinary expertise, relied upon published scientific studies, and solicited public comment and concerns. As a result of the PER process, the Department included measures to mitigate the impact of oil and gas activities in Cenex's lease. The Department argued and the Court accepted that those stipulations in the lease mitigated the impacts of Cenex's activities below the level of significance and therefore obviating the need for an EIS.
(3) Mandamus was an inappropriate remedy in this case. The Department's decision to forgo an EIS at this stage of development was a discretionary act to which courts must give a measure of deference. This Court has held previously that mandamus is not available to compel a discretionary act.

CASE:

NORTH FORK PRESERVATION ASSOCIATION, Plaintiff and Respondent, v. DEPARTMENT OF STATE LANDS, a Department of the State of Montana, Defendant and Appellant, and Farmers Union Central Exchange (Cenex), Intervenor and Appellant.

No. 88-516.
238 Mont. 451.
Submitted June 15, 1989.
Decided Aug. 22, 1989.
Rehearing Denied Sept. 14, 1989.
778 P.2d 862.

Appeal from the District Court of Flathead County.
Eleventh Judicial District.
Hon. Michael Keedy, Judge Presiding.
See C.J.S. Health and Environment sec. 119.

Reversed, writ of mandate dissolved, case remanded.
MR. JUSTICE HUNT dissented and filed opinion.
Tommy H. Butler argued, Dept. of State Lands, Helena, Doug James argued, Moulton, Bellingham, Longo & Mather, Billings, Dana L. Christensen, Murphy, Robinson, Heckathorn & Phillips, Kalispell, for appellants.
Jon L. Heberling argued, McGarvey, Heberling, Sullivan & McGarvey, Andrew Bittker argued, Kalispell, for plaintiff and respondent. MR. JUSTICE McDONOUGH delivered the Opinion of the Court. This appeal involves an oil and gas lease on school trust land within the Coal Creek State Forest, which was acquired from the State by the Farmers Union Central Exchange (Cenex). School trust lands are administered by the Department of State Lands (Department), which issued the lease to Cenex. Pursuant to an Annual Operating Plan approved by the Department, Cenex proposes to drill an exploratory well on its leased tract. North Fork Preservation Association (North Fork) has challenged the Department's approval of Cenex's operating plan, alleging that the Department failed to prepare an environmental impact statement on the proposed well as required by law. North Fork filed its complaint in the District Court of the Eleventh Judicial District, Flathead County, and obtained a summary judgment in its favor. The judgment set aside the Department's approval of Cenex's operating plan; issued a writ of mandate directing the Department to prepare an environmental impact statement; and awarded costs, fees and a small money judgment. We reverse, and remand the case to the District Court for entry of judgment in favor of the Department. We hold that the District Court incorrectly applied the "clearly erroneous" standard for reviewing the Department's decision and misinterpreted applicable statutory and case law. We further hold that the Department's decision was proper under the correct, "arbitrary, capricious or unlawful" standard of review, and that mandamus was not a proper remedy in this case, as mandamus is not available to compel a discretionary act.

The parties have stated a number of issues, some of which overlap: As Stated by the Department:

1. Whether the Department must prepare an environmental impact statement on the drilling of a single exploratory well on school trust land which had been previously clear-cut of timber and is managed under the multiple use concept.

2. Whether the Department is required to prepare a site-specific environmental impact statement concerning full-field oil and gas development.

3. Whether mandamus is an inappropriate remedy to enforce the provisions of the Montana Environmental Policy Act.

4. Whether North Fork Preservation Association sustained its burden of proof.

As Stated by Cenex:

1. Did the District Court apply the wrong standard of review in reviewing the State Lands' decision that approval of Cenex's plan to drill one exploratory well was not a major action of state government significantly affecting the quality of the human environment?

2. Whether State Lands' decision that an environmental impact statement was not required was arbitrary and capricious.

3. Whether the 1984 preliminary environmental review was sufficient, as a matter of law, without considering the "cumulative impacts" of oil and gas development and production.

4. Whether a writ of mandamus will lie to compel the preparation of an environmental impact statement.

As Stated by North Fork:

1. Did the District Court apply the wrong standard of review to State Lands' procedural

decision to forego an environmental impact statement?

2. Whether the Cenex operating plan "may significantly affect environmental attributes recognized as being endangered, fragile, or in severely short supply." ARM 26.2.603(3)(a).

3. Piecemealing: At what stage in the oil and gas lease process is an environmental impact statement on development legally required?

4. Is there a separate ground supporting the District Court's decision, which State Lands and Cenex did not raise on appeal?

5. Whether the 1984 preliminary environmental review was legally sufficient, particularly in its evaluation of cumulative impacts.

6. Whether a writ of mandate will lie to compel preparation of an environmental impact statement.

In April of 1975, the Department received applications for oil and gas leases on 14 tracts of school trust land in the Coal Creek State Forest. The Department deferred action on possible leases until an environmental impact statement (EIS) could be prepared. Coal Creek State Forest is bordered on three sides by National Forest Service land, and on the fourth side by the North Fork of the Flathead River. The river is part of the National Wild and Scenic Rivers System, as well as the western boundary of Glacier National Park.

The surrounding National Forest Service land was also the subject of oil and gas development proposals at about the same time. In 1976, the National Forest Service issued a draft EIS concerning proposed leases on land in its charge. The Department also issued an EIS in 1976. The introduction to the Department's EIS stated that the National Forest Service EIS dealt with the impacts of oil and gas leasing in the larger area surrounding Coal Creek, and the Department's EIS would therefore focus only on the state lands involved and should be considered "an extension of that made by the federal government." The Department's EIS permitted leasing of all 14 Coal Creek tracts. However, at a meeting of the State Board of Land Commissioners held in March of 1976, all of the bids received were rejected. The National Forest Service subsequently undertook a new environmental analysis of the area, and abandoned its 1976 draft EIS.

In 1982, the Department received new applications for oil and gas leases covering a larger portion of the Coal Creek area. The Department prepared a preliminary environmental review (PER) for the purpose of determining whether issuance of oil and gas leases would be an action by state government "significantly affecting the quality of the human environment," therefore requiring an EIS under sec. 75-1-201, MCA. The PER was issued in 1983, and concluded that no such significant effect would result if certain protective stipulations were included in any leases granted.

The Department then offered leases in Coal Creek State Forest at public auction. Cenex purchased leases to 17 tracts. Each lease contained 16 environmentally protective stipulations. Under these stipulations, Cenex was required to submit an annual operating plan to the Department detailing all activities to be carried out on the leased acreage during the coming year. No activity could be undertaken until written approval of each year's plan was received from the Department.

Cenex's first annual operating plan was submitted in 1984. The plan proposed drilling an exploratory well on one of the leased tracts located approximately three miles south of the town of Polebridge and one mile west of Glacier Park. The proposed well site was a clear-cut left from previous logging under lease from the Department. Cenex planned to make improvements to an existing logging road in order to transport necessary drilling equipment and supplies. The Department delayed approval of the plan while it completed a site-specific PER, held two public hearings and received comments on the PER during a 30-day review period. After reviewing the comments, the Department issued a supplement to the PER. The Department then approved the plan, subject to 31 additional protective stipulations.

In February of 1985, North Fork filed this action. The complaint sought an order setting aside the Department's approval of the Cenex operating plan and the Cenex lease, and a writ of mandate directing the Department to prepare an EIS on the cumulative effects of oil and gas development in the Coal Creek area. Cenex successfully petitioned to intervene as a defendant in the case. The Department and Cenex filed a motion for summary judgment, as did North Fork. In 1988, the District Court issued a Memorandum and Order granting North Fork's motion, and subsequently entered judgment in North Fork's favor. This appeal followed.

The many issues taken up by the parties have rendered their arguments difficult to follow. North Fork has gone so far as to attempt a "chart of corresponding issue numbers" in its brief to this Court. A careful reading of the issues and arguments offered, as well as the record from below, shows that the parties are posing three core questions:

1. Did the District Court apply the proper standard of review? 2. Did the Department proceed properly in approving Cenex's annual operating plan?

3. Is mandamus an appropriate remedy to enforce provisions of the Montana Environmental Policy Act? We will proceed with our review by addressing these three questions. I.

[1] The District Court looked to the Montana Administrative Procedure Act (MAPA) for its standard of review. The court applied the standard of review found in sec. 2-4-704(2)(e), MCA:

"(2) ... The court may reverse or modify the decision if substantial rights of the appellant have been

prejudiced because the administrative findings, inferences, conclusions, or decisions are:

"...

"(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

On appeal, the Department and Cenex argue that the "clearly erroneous" standard was improper in this case. Cenex specifically argues that sec. 2-4-704, MCA, was inapplicable, because the section deals with judicial review of "contested cases", and this was not a contested case. A "contested case" is defined at sec. 2-4-102(4), MCA, as a proceeding before an agency where a "determination of legal rights, duties, or privileges" of a party is required to be made after an opportunity for hearing. In contrast to cases such as State ex rel. Montana Wilderness Association v. Board of Natural Resources and Conservation (1982), 200 Mont. 11, 648 P.2d 734, no hearing was requested or held before the Department in this case. North Fork did not initiate this action until after the Department had approved Cenex's operating plan. There was no "evidentiary record" against which to measure the Department's decision and determine whether it was clearly erroneous. Cenex is therefore correct in asserting that sec. 2-4-704, MCA, does not apply in this case.

Both Cenex and the Department argue that the District Court should have employed an "arbitrary and capricious" standard. The Department asserts that decisions by administrative agencies are given deference by reviewing courts due to the agencies' access to superior expertise, and are not overturned unless arbitrary or capricious. The Department notes that in Wilderness Association, 648 P.2d at 740, this Court cited deference to agency expertise as one of three important factors in selecting a standard of review in a contested case. Cenex notes that the arbitrary and capricious standard was used prior to the enactment of MAPA, and would logically apply in this case. Our decision in Langen v. Badlands Cooperative State Grazing District (1951), 125 Mont. 302, 308, 234 P.2d 467, 470, which is cited by Cenex, is relevant to both points:

"The review by the district court is only for the purpose of determining the legal rights of the parties involved. This is so because of the division of governmental powers under the Constitution, neither the district court nor the Supreme Court may substitute their discretion for the discretion reposed in boards and commissions by the legislative acts. [citations] "...

"The appeal from the commission to the district court is for the purpose merely of determining whether upon the evidence and the law the action of the commission is based upon an error of law, or is wholly unsupported by the evidence, or clearly arbitrary or capricious. On such review courts will only inquire insofar as to ascertain if the board or commission has stayed within the statutory bounds and has not acted arbitrarily, capriciously or unlawfully. [citations]"

Both sides agree that because the Montana Environmental Policy Act (MEPA) is modeled after its federal counterpart (NEPA), this Court can look to federal decisions under NEPA as an aid to addressing cases under MEPA. See Kadillak v. Anaconda Co. (1979), 184 Mont. 127, 602 P.2d 147. In fact, North Fork argues that we should adopt the "reasonableness" standard utilized by the U.S. Court of Appeals for the Ninth Circuit in cases cited in North Fork's brief. While looking to federal decisions is not always conclusive, cases decided on analogous facts can shed light on a given issue. The United States Supreme Court recently took up two companion cases involving the issues at bar. In one of those cases, Marsh v. Oregon Natural Resources Council ___ U.S. ____, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989), the Supreme Court addressed the issue of the proper standard for review of an agency decision not to amend a previously-issued EIS. The argument before the Court was that newly-discovered information cast doubt on the agency's previous conclusion that the proposed project would not significantly affect the environment. The agency involved had decided that the information did not raise questions sufficient to require amendment of the EIS. This case presents an analogous question. North Fork alleged several specific shortcomings in the procedure followed by the Department in approving Cenex's annual operating plan. The thrust of these contentions, when taken together, is that the information gathered by the Department indicated that Cenex's proposed well would generate a significant impact on the human environment, and an EIS should have been prepared. As in any comparison between federal and Montana law, there is a distinction between Marsh and this case. In Marsh, the federal Administrative Procedure Act was applicable where in this case MAPA judicial review provisions do not apply. However, the federal act offers several possible standards of review. In choosing a standard, the Supreme Court in Marsh specifically rejected the "reasonableness" standard used by the Ninth Circuit Court of Appeals and adopted the "arbitrary and capricious" standard. In explaining its choice, the Court stated:

"The question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise .... Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.' [citations]"

The Department in this case was carrying out its statutorily-imposed fiduciary duty to "secure the largest measure of legitimate and reasonable advantage to the state" in managing school trust lands. Section 77-1-202, MCA. The Department also had to carry out duties imposed by MEPA, pursuant to which it prepared a PER in order to gather information for its decision on whether to prepare an EIS for Cenex's proposed action. This decision necessarily involved expertise not possessed by courts and is part of a duty assigned to the North Department, not the courts. In light of this, and the cases cited above, we hold that the

standard of review to be applied by the trial court and this Court is whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully.

II.

When applying the above standard of review to this case, it is important to keep in mind which Department action is challenged by North Fork: the approval of Cenex' Annual Operating Plan, which calls for the drilling of an exploratory well. North Fork has contended, and the District Court has held, that this action should not have been undertaken without prior preparation of an EIS. It is apparent from our review of the record, however, that the arguments of counsel and the District Court's Memorandum and Order have strayed from the issue of the operating plan to consider policies and activities that are not at issue here. This is a primary reason for our reversal of the District Court's judgment.

A. The Department's Decision Was Not Unlawful.

[2] While the standard of review we have adopted utilizes three terms, it breaks down into two basic parts. One part concerns whether the agency action could be held unlawful, and the other concerns whether it could be held arbitrary or capricious. See Langen, 234 P.2d at 471. We will first address the "unlawful" portion. The Department is both empowered and constrained by a set of statutes and regulations relevant to its actions challenged in this case. One such statute is sec. 77-1-202, MCA, cited above, which imposes a fiduciary duty on the Department to manage the land at issue to the advantage of the State. The procedures followed by the Department in its dealings with Cenex were governed in part by MEPA (secs. 75-1-101, et seq., MCA) and administrative rules enacted pursuant to MEPA (ARM 26.2.602, et seq. repealed 11/1/89; recodified at ARM 26.2.642, et seq.). North Fork's complaint in the District Court alleged in large part that the Department failed to carry out its appointed duties under these provisions. In the brief filed in support of its motion for summary judgment, North Fork made three arguments:

"1. [The Department's] decision to forego an EIS at the stage of drilling an oil well was clearly unreasonable and wrong. Conner v. Burford, 605 F.Supp. 107 (D. Mont. 1985) and Kadillak v. Anaconda Co. (1979), 184 Mont. 127, 602 P.2d 147.

"2. The case is clearly one where the decision 'may significantly affect' endangered species and a fragile environment, requiring an EIS under ARM 26.2.603(3)(a).

"3. [The Department] omitted to perform an evaluation of cumulative impacts, in violation of ARM 26.2.604(1)(b) and (c)."

Two of these arguments, the first and third, are directly relevant to the "unlawful" portion of our standard of review.

The District Court's Reliance on Conner v. Burford. The District Court agreed with North Fork's first argument, and relied on Conner v. Burford, supra, to hold the Department's 1976 EIS, 1983 PER and 1984 PER to be insufficient. At the outset, the court adopted North Fork's broad view of the development of oil and gas in the Coal Creek area, and concluded that full-field development required the preparation of an EIS. The Department had argued that its 1976 EIS was sufficient for this purpose. The court found, however, that the 1976 EIS was insufficient because it focused only on Coal Creek lease tracts and did not address the overall impacts of such development. Without a valid EIS, the two PER's became "falling dominos," their environmentally protective stipulations mere examples of the kind of "piecemeal" approach to environmental review held improper in Conner. We disagree.

First, the Department's 1976 EIS has no relevance to this case. The overall impacts of full-field oil and gas development in the Coal Creek State Forest are not at issue. Section 75-1-201, MCA, (entitled "General Directions -- Environmental Impact Statements") sets out guidelines for "every recommendation or report on proposals for projects." ARM 26.2.603 ("Determination of Necessity for Environmental Impact Statement") governs consideration of a "proposed action". The proposed project/action under consideration in this case is the drilling of one exploratory well on one lease tract. In considering this proposed action, the Department prepared a site-specific PER in 1984, which supplemented a more general PER prepared in 1983. The conclusion reached by the Department was that an EIS was not required for the single Cenex test well. This is the decision under review. Second, while the District Court was correct in asserting that "[i]f found rich in oil and gas the acreage in question would be under tremendous pressure for further exploration and development," it was premature in concluding that an EIS was required. The court's conclusion apparently resulted from a misreading of the Conner case. The decision of the U.S. District Court for the District of Montana in Conner, cited by North Fork in its brief below, dealt with the question of when an agency action would "significantly affect" the environment, thus requiring preparation of an EIS. This is the same standard employed in sec. 75-1-201, MCA, and its attendant regulations. The Federal District Court held that issuance of a lease permitting oil and gas development was "the first stage of a number of successive steps" leading to development, and therefore met the "significantly affect" standard. The court feared that proceeding with a piecemeal environmental review by considering only one step at a time would ignore the cumulative effects of development and risk unforeseen, irreversible impacts.

When reviewing the decision, however, the Ninth Circuit Court of Appeals made an important distinction. The appellate court reviewed case law determining that under the "significantly affect" standard, an EIS was always required at the "go/no go" point of oil and gas development. The test derived to pinpoint when the "go/no go" point is reached looks for the proposed action that will entail an "irretrievable commitment of resources". Some of the leases at issue in Conner had "no surface occupancy" (NSO) clauses. Under these clauses, no activity which would disturb the ground in any way could be undertaken without prior approval from the agency involved. The Ninth Circuit Court held that leases with NSO clauses were not an irretrievable commitment of resources. Nothing could happen under the leases without government approval. The point had not been reached where preparation of an EIS was "automatic." The court also noted, "We cannot assume that government agencies will not comply with their NEPA obligations in later stages of development." Conner v. Burford, 836 F.2d 1521 at 1528 (9th Cir. 1988).

Cenex will operate under essentially the same type of strictures found in the Conner NSO leases. The lease at issue in this case was executed on a printed "Montana Oil and Gas Lease" form supplemented in blank spaces with information specific to the lease arrangement between the Department and Cenex for this well site. North Fork has made much of the printed language in the initial portion of the lease indicating that Cenex thereby acquires the right to do the following:

"... mining and operating for oil and gas, and of laying pipelines, building tanks, power stations, and other structures thereon necessary in order to produce, save, care for, dispose of and remove the oil and gas ..." According to North Fork, it is hard to imagine these activities not significantly affecting the human environment of the Coal Creek area. North Fork is correct in that the lease could ultimately empower Cenex to conduct all of the listed activities, and it is easy to imagine these activities having a significant effect on the environment. However, the lease also contains specific environmental stipulations typed into to the lease form under paragraph 26, entitled "Special Provisions". One of these typed stipulations reads:

"If the lessee [Cenex] intends to conduct any activities on the leased premises, it shall submit to the Department of State Lands two copies of an Annual Operating Plan or Amendment to an existing Operating Plan, describing its proposed activities for the coming year. No activities shall occur on the tract until an Annual Operating Plan or Amendments have been approved in writing by the Commissioner of State Lands or his designated representative." (Emphasis supplied.) It is a fundamental principle of contract law that written or typewritten provisions in a contract take precedence over printed provisions. Hoerner Waldorf Corp. v. Bumstead-Woolford Co. (1972), 158 Mont. 472, 494 P.2d 293. The typed "special provision" therefore takes precedence over the printed authorization in this lease. Cenex can carry out the listed activities only with prior written approval of the Department. The issuance of this lease was thus not an "irretrievable commitment of resources" as the term was used in Conner. The District Court was incorrect in concluding that full development of oil and gas in the Coal Creek State Forest was a matter of successive steps set into irreversible motion by the issuance of the lease. Like the Ninth Circuit in Conner, this Court cannot assume that the Department will not comply with its MEPA obligations if development proceeds beyond this stage.

The 1983 PER. The District Court's misapplication of the Conner decision also tainted its holdings that the 1983 and 1984 PER's were insufficient. Because the 1984 PER is a "supplement" to the 1983 PER, the court's holdings on both documents are relevant. The court held the 1983 PER inadequate because it relied on the inclusion of environmentally protective stipulations to support its finding that issuing leases would not significantly affect the human environment. The District Court held this approach insufficient for two reasons: (1) it represented piecemealing prohibited by Conner and (2) it should have been a "programmatic" review as required by ARM 26.2.614. Our discussion of Conner has shown that a lease issued pursuant to the 1983 PER need not be violative of the ruling in Conner, and the lease involved here in fact was not. As to ARM 26.2.614, the court engaged in selective reading of this rule, which has resulted in misinterpretation. The court and North Fork have at several points focused on portions of relevant provisions utilizing the words "shall" or "must" to conclude that the Department failed to carry out mandatory procedures. However, a cursory examination of ARM 26.2.614 reveals that the procedures listed are subject to a very prominent "if":

"(1) If the department is contemplating a series of agency-initiated actions [which] will constitute a major state action significantly affecting the human environment, the department may prepare a programmatic review ..." (Emphasis supplied.) Again, our discussion above shows that the contemplated action at issue in the 1983 PER was the issuance of leases, which the Department determined did not constitute state actions significantly affecting the human environment. That decision was not challenged by North Fork, so no programmatic review was required.

The 1984 PER. The District Court adopted North Fork's third argument in holding the 1984 PER to be insufficient. North Fork asserted that under ARM 26.2.604, an evaluation of the cumulative impacts of the proposed action was mandatory. The District Court found the 1984 PER insufficient because of its failure to address cumulative impacts.

The term "cumulative impacts" is defined in ARM 26.2.602(1). The rule states that analysis of cumulative impacts under this definition involves consideration of past and present actions related to the proposed action. The proposed action under consideration in the 1984 PER was the drilling of the test well, the first such well

in the Coal Creek area. The only past related action was the issuance of leases to Cenex, which was the subject of the 1983 PER. The 1983 and 1984 PER's fulfill the requirement of ARM 26.2.604 in that they examine the impacts of issuing leases and drilling a single test well, the only related proposed actions before the Department.

The arguments advanced by North Fork and the District Court's Memorandum attack the 1984 PER for failing to consider the cumulative impacts of related future actions, namely the full-field development of oil and gas. However, ARM 26.2.604 requires consideration of related future actions only when they are under current consideration. As we stated above, full-field development was not a proposed action before the Department. It was not included in Cenex's Annual Operating Plan, and therefore was not under "current consideration".

In sum, the arguments advanced by North Fork and the rationale provided by the District Court failed to show that the Department acted "unlawfully" in determining that approval of Cenex' first annual operating plan did not require an EIS. Our review of the record has not uncovered any statute or regulation violated by the Department in its dealings with Cenex thus far. The Department has followed required procedures and included in its PER's the information required by statute and administrative rules. Nor can the decision on the Cenex test well be analogized to the situation in Conner. Even under the Conner criteria, the Department made its decision to forego an EIS at a point in the process where that decision was still left to the Department's discretion. We therefore proceed to examine the Department's decision under the "arbitrary or capricious" portion of our standard of review.

B. The Department's Decision Was Not Arbitrary Or Capricious. [3] North Fork's second argument in its brief in support of its motion for summary judgment addressed the 1984 PER, and is relevant to this portion of our review. North Fork asserted that by the Department's own analysis, the approval of the well was an action significantly affecting the human environment. North Fork is critical of the Department's treatment of the effects the well might have on bald eagles, grizzly bears or gray wolves thought to inhabit or at least frequent the Coal Creek area. North Fork notes that the Department employs no eagle biologist or wolf biologist, and no wildlife biologist is included in the list of PER preparers. However, North Fork's brief states,

"The issue here is not the questionable quality of the [eagle, bear and wolf] biology in the PER. The issue is whether there is a 'may affect' situation ..."

According to North Fork, such a situation "clearly" exists, and an EIS should have been prepared prior to approval of the Cenex Annual Operating Plan. For each of North Fork's contentions, it quotes a portion of the 1984 PER discussing possible impacts of the well on that animal. North Fork does not contend that required analyses are missing, nor does it focus on the adequacy of the analyses given. North Fork simply contends that the impacts discussed are evidence themselves that the well may significantly affect these facets of the human environment. Its criticism of the lack of wildlife biologists in the list of preparers appears aimed at showing that the Department did not recognize the import of even the "questionable analysis" found in the PER. According to North Fork, the Department was therefore incorrect in deciding that drilling a test well would not significantly affect the human environment, and its decision ran afoul of the "unreasonable" standard of review.

Our analysis will be similar to that employed by North Fork, except for the actual standard of review applied. This Court has not had the opportunity to review an administrative decision under MEPA utilizing the "arbitrary or capricious" standard. In the Marsh case, however, the U.S. Supreme Court stated a method for conducting such a review:

"As we observed in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 [91 S.Ct. 814, 823, 28 L.Ed.2d 136] (1971), in making the factual inquiry concerning whether an agency decision was 'arbitrary or capricious,' the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' This inquiry must 'be searching and careful,' but 'the ultimate standard of review is a narrow one.'"

Marsh, ___ U.S. ____, 109 S.Ct. at 1861. It is also worth noting that our decisions in cases decided under MAPA (see, e.g., Thomton v. Comm'r of the Dep't of Labor and Indus. (1981), 190 Mont. 442, 621 P.2d 1062; Wildemess Association, 648 P.2d at 740) have recognized the limited scope of review in administrative cases. We cannot substitute our judgment for that of the Department by determining whether its decision was "correct." Instead, we must examine the Department's decision to see whether the information set out in the PER's was considered, or the decision to forego an EIS was so at odds with that information that it could be characterized as arbitrary or the product of caprice.

We will read the 1983 and 1984 PER's together, because as noted above, the 1984 PER was intended to supplement the 1983 PER. In these documents, the Department had before it analyses of the possible impacts of drilling the test well that raised a number of environmental concerns. There were questions about maintaining the purity of the water in the North Fork of the Flathead River and a nearby glacial lake. There were questions about how the sight of the drilling rig, the noise it produced while working and the smells associated with its presence would affect endangered species such as bald eagles that nested at the glacial lake, grizzly bears that were thought to use the Coal Creek drainage as a travel corridor to find food, and gray

wolves which were slowly being reintroduced to the area. There were also questions about how these same sights, sounds and smells would affect activities such as camping, river floating and hiking along the river and in Glacier Park. The 1983 PER consumed 39 pages in addressing these and other questions, while in the 1984 PER the analyses required 75 pages. In the process of preparing the two PER's, the Department consulted with over 30 departments and organizations, including the Environmental Protection Agency, the Border Grizzly Project and Wolf Ecology Project at the University of Montana School of Forestry, the Rocky Mountain Oil and Gas Association, and Glacier National Park. The Department also utilized over 60 published studies and other references. During public comment on the 1984 PER, the Department received 70 letters from concerned groups and individuals. Clearly, there were many concerns expressed and much information provided. In response to this process, the Department decided to include measures to mitigate the impact of oil and gas activities in the form of stipulations to Cenex's lease and to the written approval of Cenex's operating plan. The Department has argued that these stipulations prevented its approval of the operating plan from rising to the level of a state action significantly affecting the human environment. At the federal level, the Ninth Circuit Court of Appeals has held that such "mitigation measures" are to be considered in reviewing a decision to forego an EIS, and if the measures are "significant", they may justify such a decision under the "unreasonable" standard. Friends of Endangered Species, Inc. v. Jantzen (9th Cir. 1985), 760 F.2d 976, 987. Given the narrower, "arbitrary or capricious" standard being applied in this case, sufficiently significant mitigation measures certainly would justify the Department's decision.

The mitigation measures adopted by the Department have taken the form of a total of 42 protective stipulations, 11 attached to the lease and 31 attached to the approval of the operating plan. They include such measures as forbidding any activity on the lease tract during times of the year important to bald eagle nesting and grizzly bear migration. The drilling rig must be painted a color that will not stand out against the natural background, additional mufflers must be installed on the diesel engines used to power the rig, and the engines must be mounted facing a certain direction to reduce the noise reaching bald eagle nests and Glacier Park. Five stipulations deal with any necessary disturbance of the soil and its replacement. Eight stipulations concern maintaining the quality of the ground water, and include restrictions on the chemical content of drilling fluids and the size of trucks that may be used to haul diesel fuel to the rig. The stipulations also address the workers on the rig, imposing regulations on garbage disposal and forbidding the presence of personal pets, among other measures.

We have reviewed the concerns raised by the preparers of the PER's, as well as those raised by agencies consulted and members of the public. We have also reviewed the mitigation measures imposed by the Department. We conclude that the Department has considered the concerns raised and taken significant steps to address them. We therefore hold that the Department's decision to approve Cenex's annual operating plan was not arbitrary, nor was it an exercise of caprice. Having also held that the Department did not act illegally, we therefore uphold the Department's decision and reverse the District Court on this question.

III.

[4] One of the remedies afforded by the District Court was a writ of mandate requiring the Department to prepare an EIS. We have held above that an EIS was not required in this case, which makes the issuance of the writ erroneous. We feel compelled to add, however, that mandamus was an inappropriate remedy in this case. As our discussion above has brought out, the Department's decision to forego an EIS at this stage of development was necessarily an exercise of discretion to which courts must give a measure of deference. In fact, we have previously held that the Department must exercise its discretion in all phases of its management of state lands. "If the 'large measure of legitimate and reasonable advantage' from the use of state land is to accrue to the state, then the [Department] must, necessarily, have a large discretionary power. Every facet of the [Department's] action cannot, and is not, explicitly laid out in the statutes of the State Constitution." Jeppeson v. State (1983), 205 Mont. 282, 289, 667 P.2d 428, 431 (quoting Thompson v. Babcock (1966), 147 Mont. 46, 409 P.2d 808). We held in Jeppeson that mandamus is not available to compel a discretionary act. We therefore reverse the District Court on this question.

We have held that the District Court applied the incorrect standard of review in this case, and that under the correct standard, the Department's approval of Cenex's annual operating plan was proper. We have further held that mandamus was not available in this case. We therefore reverse the decision of the District Court, dissolve the writ of mandate issued by the court, and remand this case for entry of judgment in favor of the Department.

MR. CHIEF JUSTICE TURNAGE and MR. JUSTICES HARRISON, WEBER and GULBRANDSON and HON. PETER L. RAPKOCH, District Judge, sitting for MR. JUSTICE SHEEHY concur.

MR. JUSTICE HUNT, dissenting:

I dissent. The District Court's summary judgment in favor of North Fork should be affirmed.

The majority concludes that an oil well drilled in the Coal Creek State Forest, located on the North Fork of the Flathead River, will not generate such a "significant impact upon the human environment" as to require the preparation of an Environmental Impact Statement (EIS). The lease in question, however, not only gives Cenex the right to drill for oil and gas, it also empowers the corporation to engage in other activities associated with

oil and gas development -- laying pipelines, building tanks, constructing power stations and other necessary structures. Should this one exploratory well produce oil or gas, Cenex will definitely undertake these activities -- activities that will significantly affect the human environment.

Taking comfort in the lease's seemingly restrictive provisions that require Cenex to submit annually an operating plan for written approval by the Department before Cenex undertakes any additional developmental activity, the majority incorrectly concludes that the only issue involved in this case is the impact of this one well. Much more than one, site-specific well is at stake here. This well is merely the first step toward the full development of oil and gas in the Coal Creek State Forest. Should Cenex discover gas or oil with this one well, as is highly probable, the economic pressure for full-field oil and gas development of the area will be tremendous. For the majority to believe that such development is not at issue is incomprehensible.

The majority states that an EIS will not be required until Cenex has made an "irretrievable commitment of resources." An irretrievable commitment of resources occurs at the "go/no go" point of oil and gas development. With the Department's approval of Cenex's proposal to drill one exploratory well, we have reached this "go/no go" point. The drilling of one oil well on Coal Creek land constitutes a disturbance of the ground and, definitionally, an irretrievable commitment of resources. An EIS must be undertaken before the Department approves an annual operating plan that includes a proposal to drill -- whether the proposal is for one well or twenty.

The immediate and long-term effects that drilling in the Coal Creek State Forest will have on the human and physical environment are potentially devastating. Yet, by choosing to review the need for an EIS under the most lenient of all standards of review -- the arbitrary, capricious and unlawful standard -- the majority appears content to let the future of our forests, rivers, wildlife and wilderness rest in the hands of non-elected public officials. When I see the Department giving priority to the raising of revenue over the quality of our environment, I cannot share the majority's assurance that the Department is adequately carrying out its fiduciary duty to "secure the largest measure of legitimate and reasonable advantage to the state" in managing school trust lands.

The core of Montana's value derives from its natural beauty. The area involved, teeming with wildlife, includes the gateway to Glacier National Park, the Coal Creek State Forest and the North Fork of the Flathead River, which not only comprises part of the Wild and Scenic River System but also feeds the majestic Flathead Lake. The majority and the Department may be willing to exploit these state treasures without taking a hard look at the future. I, for one, cannot condone the Department's hasty and ill-considered decision to allow drilling prior to the compilation of an EIS. I would affirm the District Court.

BRIEF: (Do not cite!!!)

Montana Wilderness Association v. Board of Natural Resources and Conservation, 200 Mont. 11, 648 P.2d 734 (1982)

FACTS:

Montana Power Company (MPC) filed an application for certificate of environmental capatibility and public need pursuant to the Utility Siting Act (75-20-216), seeking permission to construct and operate an electrical transmission line from Bozeman to Ennis to Dillon including a spur from Ennis to Big Sky. The Board of Natural Resources and Conservation (BNRC) authorized MPC to construct the line. The Montana Wilderness Association and the Environmental Information Center appealed BNRC's decision to the District Court of Lewis and Clark County. The District Court affirmed the Board's decision.

MEPA ISSUES:

(1) What is the proper standard or scope review of a court in determining the adequacy of environmental impact statements?

(2) Are the draft and final environmental impact statements inadequate as a matter of law for failing to consider the need for and alternatives to the transmission facilities in the Upper Madison/Lower Ruby valleys and at Big Sky; failing to consider the "no action" alternative; and failing to undertake an adequate cost/benefit analysis?

(3) Can a deficient environmental impact statement be rendered adequate by reference to the record outside the documents?

(4) Who has the burden to raise deficiencies in the EIS process?

HOLDING:

(1) The court's standard of review on the adequacy of an environmental impact statement is governed by the Montana Administrative Procedures Act and is further refined in *Northern Plains Resource Council v. Board of Natural Resources and Conservation* (1979), 181 Mont 500, 594 P.2d 297, 36 St. Rep. 666. The court's role is limited and it may reverse or modify the lower decision where the agency decision is clearly erroneous, arbitrary, or capricious, resulting in the appellant's rights being substantially prejudiced.

(2) The draft and final impact statements are adequate as a matter of law.

Need for Project and Alternatives:

The Court, referring to federal case law, noted that while there is no separate section in the EISs devoted to the consideration of the need for and alternatives to the proposed electrical transmission lines serving the Upper Madison and Lower Ruby valley area, there is enough basic information in the documents (i.e., statistics on needs, exiting transmission line data, and projections for additional demand) for BNRC to reach an

informed decision.

The Court also noted that while the Department of Natural Resources and Conservation (DNRC) failed to conduct an independent investigation of MPC's load growth projections for Big Sky and discuss conservation alternatives in the EISs, such an omission in this case was not fatal because MPC's load projections did not form the basis of the Board's decision. Furthermore, the Court referred to the final EIS noting that it address the need for additional power to Big Sky and examined non-conservation alternatives. The court also noted that the department has subsequent to this action adopted administrative rules that require the applicant to provide assumptions for load growth and how conservation measures may eliminate the need for the proposed facility.

In addressing the appellant's claim that the EISs failed to considered the alternative of a second higher kilovolt transmission line in addition to the exiting on going through the Gallatin Canyon, the court again stressed that even though the EISs did not specifically consider the possibility of a second transmission line there was some discussion in the draft EIS about high kilovolt lines and that "it is not required that and agency perform an exhaustive study of every possible alternative."

In its holding the Court stated that the EISs "are not grossly insufficient as a matter of law in their treatment of the need for and alternatives to the proposed transmission line." The Court went on to say that:

> the primary function of the EIS is to provide the decision-maker with environmental reports sufficiently detailed to allow a knowledgeable judgement and to allow public feedback in the development of that information. We cannot say that the Board's decision was arbitrary, capricious or clearly erroneous in view of the EISs and documents that it had before it.

No Action Alternative:

It is clear, according to the court that "agencies must consider the "no action" alternative..." Although the department did not explicitly consider the "no action" alternative the court noted that department now has rules in place that consider ways that the need for a proposed facility can be eliminated. Further, the department "implicitly" determined in the final EIS that "no action" alternative would not be satisfactory by establishing that a need for additional electricity existed.

Cost/Benefit Analysis:

The Court acknowledged that the cost/benefit analysis of the electric transmission lines could have been more fully explored in the EISs. It further noted that the Legislature in House Joint Resolution No. 73 (approved March 16, 1974) directed all state agencies to achieve full compliance with Montana Environmental Policy Act specifically encouraging agencies to conduct an economic cost benefit analysis. However, when the EISs were viewed in their entirety, the Court concluded that the documents were sufficient to apprise the Board of the project's costs and benefits to enable the board to render an informed decision.

(3) The district court concluded that the entire Siting Act process and the Board's decision based upon the entire record is the functional equivalent of an EIS and thereby renders the EISs at issue sufficient. The Court did not address this issue since it held that the EISs were not insufficient as a matter of law.

(4) Where the appellant's rights are being prejudiced by substantial deficiencies in an EIS, burden is on the appellant to spell out in detail such deficiencies to enable the Department to correct the same prior to the Board hearing and adjudication.

CASE:

WILDERNESS ASSOC. v. DNRC
200 Mont. 11.

STATE ex rel., MONTANA WILDERNESS ASSOCIATION, et al., Petitioner and Appellant, v. BOARD OF NATURAL RESOURCES AND CONSERVATION of the STATE OF MONTANA, et al., Respondents and Respondents.

No. 81-354.
Submitted Dec. 2, 1981.
Decided July 9, 1982.
648 P.2d 734.

Appeal from the District Court of Lewis & Clark County. First Judicial District.
Hon. J. M. Salansky, Judge presiding.
See C.J.S., Electricity sec. 5.

Affirmed.
MR. JUSTICE MORRISON filed dissenting opinion in which MR. JUSTICE SHEA joined.
MR. JUSTICE SHEA filed dissenting opinion.
Goetz, Madden & Dunn, William L. Madden argued, Bozeman, for petitioner and appellant.
James F. Walsh, Pamela K. Merrell, Butte, Donald Macintyre argued, Dept. of Natural Resources, Helena, Richard J. Andriolo argued, Bozeman, Corette, Smith, Pohlman & Allen, R. D. Corette, Jr., argued, Butte, for respondents and respondents.
Schulz, Davis & Warren, Dillon, for amicus curiae.

MR. CHIEF JUSTICE HASWELL delivered the opinion of the Court. The Board of Natural Resources & Conservation (BNRC) granted the Montana Power Company (MPC) permission to construct a 161 KV electrical transmission line from Bozeman to Ennis to Dillon with a 161 KV spur from Ennis to Big Sky. Montana Wilderness Association, Inc. (MWA) and Environmental Information Center, Inc. (EIC) appealed BNRC's decision to the District Court of Lewis Clark County. The District Court affirmed. MWA and EIC now appeal the District Court decision to this Court.

On June 4, 1974, MPC filed with the Board an application for a Certificate of Environmental Compatibility and Public Need, pursuant to the provisions of the Utility Siting Act of 1973, seeking authorization for construction and operation of 155 miles of 161 KV electric transmission line extending from Clyde Park to a substation in the Upper Yellowstone Valley, then to Big Sky, and then to a substation outside of Dillon. Additionally, approximately 17 miles of 69 KV electric transmission line was proposed from the substation in the Upper Yellowstone Valley to Gardiner. The Utility Siting Act was amended by the legislature effective April 21, 1975, and became known as the "Montana Major Facility Siting Act." On June 30, 1975, MPC filed an amended application requesting, in lieu of the lines previously submitted, approval of 198 miles of transmission lines all of which were to be treated as one project or facility, consisting of the following:

a) Clyde Park to Emigrant - 161 KV line;
b) Emigrant to Gardiner - 69 KV line;
c) Clyde Park to Bozeman - 161 KV line;
d) Bozeman to Ennis - 161 KV line; and
e) Dillon to Ennis to Big Sky - 161 KV line.

Pursuant to the mandates of the Montana Environmental Policy Act (MEPA) and the Siting Act (Section 75-20-216, MCA) the Department of Natural Resources and Conservation (Department) studied and evaluated the proposed facility and its effects. The Department published a draft environmental impact statement in January of 1976 and, after reviewing comments from MPC, various government agencies and interested members of the public, the Department published its final EIS in April of 1976. The Department's recommendation was to approve the request except that construction of the 161 KV transmission line to Big Sky was to be routed from Bozeman to Big Sky through the Gallatin Canyon corridor, rather than from Ennis to Big Sky through Jack Creek/Cedar Creek Corridor.

On April 10, the first prehearing conference was held with Joe Sabol, a Bozeman attorney and Chairman of the Board, as hearings officer. On April 20, 1976, the Board commenced formal "certification proceedings" on the applica-tion, deeming the matter a contested case within the Montana Administrative Procedure Act (MAPA). Pretrial discovery and conferences followed and on May 7, 1976, MWA gave notice of its intent to become a party to the proceedings. On May 12, the date of the second preconference hearing (also presided over by Sabol), MWA member Rick Applegate filed an affidavit of disqualification, requesting that Sabol

disqualify himself from participating as a hearings officer and voting member of the Board. The reasons given for disqualification included charges that Sabol had previously publicly criticized the MWA (implicitly referring to an article which appeared on February 15, 1976, in the Bozeman newspaper) and that Sabol, being a paid legal representative of Ski Yellowstone, Inc. (a proposed resort whose future energy demands were likely to be an issue in the proceeding, according to the affidavit) could not render an impartial judgment. Sabol voluntarily withdrew as hearings officer on September 1, 1976, but refused to relinquish his voting position on the Board and the Board voted unanimously to deny the request that he be disqualified.

On September 23 and 24, public hearings were held before the Board where the prefiled written testimony of witnesses was admitted, oral examination taken and exhibits supporting and opposing MPC's application introduced. According to the deposition of Donald Macintyre (counsel for DNRC) and Applegate, Sabol spoke to Macintyre in the lobby during one of the recesses and, according to Applegate, told Macintyre not to examine MWA's witnesses because Madden (appellants' attorney) was building a record for appeal. After the September hearings, the parties each filed proposed findings of fact and conclusions of law with appropriate exceptions thereto filed by the opposing parties. Sabol's term on the Board terminated on December 31, 1976, and on April 21, 1977, the parties presented their final oral arguments to the Board. On October 28, 1977, the Board rendered its decision and granted the certificate to MPC, authorizing construction along the corridor preferred by MPC. Particularly, the Board found the Ennis-Jack Creek-Big Sky corridor to be preferable to the Ennis-Cedar Creek-Big Sky and Gallatin Canyon corridors, rejecting the Department's recommendation of using the Gallatin Canyon route.

On December 1, 1977, MWA and EIC filed a petition with the District Court of the First Judicial District, seeking review of that part of the Board's decision approving construction of the line from Bozeman to Ennis to Dillon, with a 161 KV spur from Ennis to Big Sky through the Jack Creek Corridor. The segment of the line from Bozeman eastward has already been constructed and is not here in issue.

After various motions and the filing of extensive briefs by the parties, the trial court heard final arguments and deemed the case submitted on December 13, 1979. On July 14, 1981, the District Court entered an order disposing of all issues raised by MWA and EIC in favor of MPC. This appeal followed.

On August 7, 1981, MPC obtained from the Board an order approving centerline location for construction of the line. Appellants, by motion dated August 10, 1981, applied to this Court for a stay of construction activities pending appeal and for an expedited briefing schedule. We denied the stay but granted an expedited briefing schedule.

The issues on appeal can be stated in this manner:

1. Are the environmental impact statements inadequate as a matter of law?

2. Are the Board's findings, conclusions and Certificate of Environmental Compatability and Public Need in conformity with statutory requirements and supported by the evidence?

3. Did Sabol's involvement deny MWA and EIC a hearing before a fair and impartial tribunal in violation of due process requirements? At the outset, we must determine the proper standard of review of this appeal.

Our standard of review is governed by the Montana Administrative Procedure Act. Section 2-4-704, MCA, provides in part:

"(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the ap-pellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

"(a) in violation oF constitutional or statutory provisions; "(b) in excess of the statutory authority of the agency; "(c) made upon unlawful procedure;

"(d) affected by other error of law;

"(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;

"(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

"(g) because findings of fact, upon issues essential to the decision, were not made although requested."

Appellants urge that the scope of review based on the above statute is whether the draft and final environmental impact statements are "in violation of the constitutional or statutory provisions" or "affected by other error of law," citing section 2-4-704(2)(a) and (d), MCA, supra. Appellants also cite Trout Unlimited v. Morton (CCA 9, 1974), 509 F.2d 1276, for the assertion that appellate courts are not bound by the "clearly erroneous" standard that govems findings of an agency or trial court. In Trout Unlimited, supra, the federal appeals court said the following regarding the correct standard: "The proper standard by which to review the adequacy of the EIS has been the subject of some confusion in this court. The nature of the confusion has been whether the Administrative Procedure Act, 5 U.S.C. sec. 706(2)(A), the 'arbitrary, capricious, an[d] abuse of discretion' standard, or sec. 706(2)(D), the 'without observance of Procedure required by law' standard or some third standard not precisely conforming to either sec. 706(2)(A) or sec. 706(2)(D) is the proper standard. See Environmental Defense Fund v. Armstrong, 487 F.2d 814 (9th Cir. 1973); Life of the Land v. Brinegar,

485 F.2d 460 (9th Cir. 1973); Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973). This confusion was eliminated from our law by Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974). We held that the sec. 706(2)(D) standard was the proper one because NEPA is essentially a: " 'procedural statute. Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them. The procedures required by NEPA, 42 U.S.C.A. section 4332(2)(C), are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed; grudging pro forma compliance will not do. We think that the courts will better perform their necessarily limited role in enforcing NEPA if they apply sec. 706(2)(D) in reviewing environmental impact statements for compliance with NEPA. . .' Lathan v. Brinegar, supra, at 693." 509 F.2d at 1282.

We have previously discussed our scope of review of an agency decision under the Montana Administrative Procedure Act at some length in Northern Plains Resource Council v. Board of Natural Resources and Conservation (1979), 181 Mont. 500, 594 P.2d 297, 36 St.Rep. 666. We emphasized how court review of agency decisions is limited:

"This Court recently set forth three basic principles underlying section 82-4216 which a District Court must consider in determining what the scope of review of an administrative decision should be: (1) that limited judicial review of administrative process by encouraging the full presenta-tion of evidence at the initial administrative hearing; (2) judicial economy requires court recognition of the expertise of administrative agencies in the field of their responsibility; and (3) limited judicial review is necessary to determine that a fair procedure was used, that questions of law were properly decided, and that the decision of the administrative body was supported by substantial evidence. Vita-Rich Dairy, Inc. v. Department of Business Regulation (1976), 170 Mont. 341, 553 P.2d 980." 181 Mont. at 509, 594 P.2d at 303, 36 St.Rep. at 67.

We also quoted from the case of Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc. (1978), 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460:

" 'the role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review.

" '"Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions." [Citation omitted.]' Vermont Yankee, 435 U.S. at 555, 98 S.Ct. at 1217. (Emphasis supplied.)" 181 Mont. at 511, 594 P.2d at 304, 36 St.Rep. at 672.

[1] We are not persuaded by appellants that we should move from our position taken in Northern Plains. It is an accurate statement of what kind of court review should be given to agency decisions. Furthermore, we note the mandates of the Montana review statute cited above (section 2-4-704(2), MCA) which contains a clear indication that the legislature intended that a Court reverse or modify the lower decision where the agency decision is clearly erroneous, arbitrary, or capricious, resulting in the appellants' rights being substantially prejudiced.

With regard to the first issue on appeal, appellants claim the draft and final EIS's are inadequate as a matter of law on several grounds: the failure to consider the need for and alternatives to the proposed facility in the Upper Madison/Lower Ruby valleys and at Big Sky; the failure to consider the "no action" alternative; the failure to undertake an adequate cost/benefit analysis; and the contention that deficient Environmental Impact Statements cannot be rendered adequate by reference to the record outside the documents. We will consider each in turn.

Appellants first charge that the failure to consider the need for, and alternatives to, the facility in the Upper Madison/Lower Ruby valleys renders the EIS's legally inadequate. Chapter Three of the draft EIS discusses the need of the proposed facility and outlines the needs for the areas of Big Sky, Bozeman, Yellowstone National Park and the Yellowstone Valley. Chapter Four addresses alternative transmission methods generally and specific transmission alternatives to the four above areas. In neither chapter is there a discussion of the Upper Madison/Lower Ruby valleys. Appellants refer to several points in the record where this deficiency was noted by various individuals.

The Department, in its briefs to the District Court and to this Court, acknowledges that the EIS's contain no adequate consideration of alternatives to a 161 KV line serving the Upper Madison/Lower Ruby valleys. The Department justifies this omission by stating that MPC failed to comply with the Siting Act and the rules adopted pursuant thereto in identifying in MPC's application the need for a facility to serve the demand in the Upper Madison/Lower Ruby valleys.

It is true there is no separate section of the draft EIS devoted to consideration of alternatives to the proposed electrical transmission line serving the Upper Madison/Lower Ruby valley area. However, Chapter Three of the draft EIS contains statistics and data on the needs of the Upper Madison/Lower Ruby valley including regulation statistics, existing transmission line data, a map showing a significant growth in sprinkling irrigation permit filings which would constitute additional electrical demand, a showing that Vigilante Electric Cooperative which uses MPC transmission lines in the area projects almost doubling the electrical load between 1972 and 1978, and a table showing substantial increases in peak electrical loads at substations in

the area.

Chapter Four of the draft EIS discusses alternatives to MPC's proposed 161 kilovolt transmission line as a whole including expansion of MPC's Madison hydroelectric plants, upgrading and additions to existing transmission facilities, and underground transmission lines. Chapter Six includes an analysis of environmental impacts on the Upper Madison/Lower Ruby valley.

We note what the federal courts have said with regard to environmental impact statements under the National Environmental Policy Act. In Trout Unlimited v. Morton, supra, the Ninth Circuit Court of Appeals stated: "That is, in our opinion an EIS is in compliance with NEPA when its form, content, and preparation substantially (1) provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information." 509 F.2d at 1283.

In Life of the Land v. Brinegar (9th Cir. 1973), 485 F.2d 460, 472, the court addressed what kind of consideration of alternatives is mandated by NEPA: "NEPA's 'alternatives' discussion is subject to a construction of reasonableness. N.R.D.C., Inc. v. Morton, supra, 458 F.2d [827] at 834. Certainly, the statute should not be employed as a crutch for chronic faultfinding. Accordingly, there is no need for an EIS to consider an alternative whose effect cannot be reasonably ascertained, and whose imple-mentation is deemed remote and speculative. Id. at 834. Rather, the EIS need only set forth those alternatives 'sufficient to permit a reasoned choice'. Id. at 836."

[2] While it would have been preferable if the environmental impact statements in this case had separately considered the need for the facility in the Upper Madison/Lower Ruby valleys and alternatives thereto, the basic information to enable the Board to reach an informed decision was before the Board. The EIS's substantially complied with the mandates of MEPA and provided the Board "with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project," Trout Unlimited, supra. We find no grounds for reversal or modification of the Board's decision in our limited review under section 2-4-704, MCA, discussed above.

Appellants' next claim is that the EIS's fail to adequately address the need for, and alternatives to, the proposed facility at Big Sky contending that there was no investigation of the basis of MPC's projected load which would justify additional electrical transmission service. Appellants reason that analysis of conservation alternatives is required by both the Siting Act and NEPA, citing section 75-20-503(1)(a) and (f), MCA, and two cases, Environmental Defense Fund v. Corps of Engineers (5th Cir. 1974), 492 F.2d 1123 and Libby Rod and Gun Club v. Poteat (D.C.Mont.1978), 457 F.Supp. 1177, aff'd in part and rev'd in part (9th Cir. 1979), 594 F.2d 742. Sections 75-20-503(1)(a) and (f), MCA, provide as follows:

"Environmental factors evaluated. In evaluating long-range plans, conducting 5-year site reviews, and evaluating applications for certificates, the board and department shall give consideration to the following list of environmental factors, where applicable, and may by rule add to the categories of this section:

"(1) energy needs:

"(a) growth in demand and projections of need;

"...

"(f) conservation activities which could reduce the need for more energy;"

We have reviewed the nature of the project in Corps of Engineers, supra, as outlined in both the Fifth Circuit Court opinion and the District Court opinion (348 F.Supp. 916) and fail to see how the case either supports or weakens appellants' position. Corps of Engineers involved challenges to the Tennessee-Tombigbee Waterway, a navigation project, extending from Demopolis, Alabama to the Tennessee River. Nowhere do we find discussion regarding electrical transmissions facilities and projected loads. Although the court rejected the Corps' defense that the development of alternatives need only take place where a project involves detrimental environmental impacts, we do not find that statement dispositive here.

Poteat, supra, involved the proposed construction of additional electrical generating units ("LAURD") at Libby Dam. In the District Court opinion, Judge Murray addressed the Corps' projected load forecasts and the conservation alternative:

"The peak-power deficit forecasts relied upon by the Corps reflect the years 1974-75, yet LAURD was not projected for completion until 1982-83. The current forecasts for the early 1980's, as projected by the Bonneville Power Administration (BPA) and the Pacific Northwest Utilities Coordinating Council show a surplus of peaking power and a shortage of baseload power, even without LAURD. "...

"The reference to the alternative of conservation is much too conclusory. The Corps discusses the importance of conservation, but dismisses it as a viable alternative to LAURD, saying 'there is not at present sufficient evidence to warrant delaying the on-line dates of Libby Additional Units.' Recent studies by the BPA and the General Accounting Office indicate there is evidence to conclude that conservation in the Pacific Northwest will have a considerable impact. This information should be explored and analyzed in greater depth by the Corps in preparing a new EIS." 457 F.Supp. at 1188-89.

[3] The Department justifies its failure to conduct an independent investigation of MPC's load projections by

stating that, in 1975, the Department determined that its legal mandate did not extend to denying increased electrical energy to Montana consumers on the basis of the ultimate use of the electricity, or to setting a maximum amount of electrical energy that existing electric consumers may consume. The Department concedes, however, that it has, subsequent to 1975, refined its procedures such that the concerns raised by appellants would be addressed. Additionally, applicants are now required, by Administrative Rules of Montana, section 36.7.304(1)(b)(ii) and (b)(B) to provide to the Department the assumptions underlying load growth projections and how conservation measures may eliminate the need for the proposed facility:

"36.7.304 CONTENT OF APPLICATIONS FOR ELECTRIC TRANSMISSION LINES AND GAS OR LIQUID TRANSMISSION LINES An application for a facility defined in subsections 75-20-104(10)(b) and 75-20-104(10)(c) of the Act which is an electric transmission line or gas or liquid transmission line shall contain the following:

"...

"(b) Applications for electric transmission lines not based solely on transient stability considerations shall include the following: "...

"(ii) 10-year historical and 10-year projected load growth data at each point of distribution in the area needing additional facilities. These data shall be provided in tabular and graphic form. Projections of load growth shall include a description of the assumptions used in making the projection. This shall include, but not be limited to, assumptions about: population growth; changes in electrical use per household; industrial, commercial, and agricultural use of electrical energy and power; economic conditions affecting industrial and commercial activity; conservation; and renewable alternative energy use. The effect upon demand of changes in the average price and rate structure for electric energy shall be assessed. "...

"(B) An explanation shall be given of the effects of the applicant's energy conservation or promotion programs, if any, on past and present energy consumption rate and on future energy growth rates. The applicant shall assess the potential for conservation and reduction in promotional activities for reducing or eliminating the need for the proposed facility. The application shall include a discussion of the consistency of the proposed facility with state, regional, and national energy and conservation policies and programs;" (Emphasis added.)

The alternatives, in addition to conservation, that appellants contend were not sufficiently treated by the EIS's include on-site diesel generating facilities, waste heat sources, wind power, solar power and the use of more insulation. Although the Department might be well advised to look behind any load growth projections to determine their validity and legitimacy because an applicant's projections may very well be self-serving to a certain degree (to justify the proposed project), failure to do so is not fatal in this case as MPC's load projections did not form the basis of the Board's decision.

We further note that, in the final EIS, the Department specifically states that MPC's load projections did not control its decision and discusses the discrepancy between the projections and actual need:

"The Department is not basing its decision regarding the need for an additional line to Big Sky on the accuracy of the applicant's load projections for Big Sky. A comparison of Table 2, which contains the historical peak load data for Big Sky, with Big Sky projections shown in Table 3-7 of the Draft EIS (page 23) demonstrates that growth is not occur-ring as projected. Table 2 data indicate that the peak load for winter 1975-1976 will likely be about 9048 KW, the same as the 1974-1975 winter peak. The projected values from Table 3-7 of the Draft EIS were 10,950 KW for winter 1974-1975 and 12,455 KW for winter 1975-1976. With respect to comparisons between the actual Big Sky peak loads and the applicant's projections, the applicant has stated:

" 'The construction schedule of Big Sky must be considered when analyzing load projections. The estimates prepared by Mr. Hildreth (of MPC) were based on information supplied by Big Sky which showed construction of over 700 condominium units and over 50 residences by the 1975-1976 season. The Draft Impact Statement, Clyde Park-Dillon, on Page 21, indicates that 37 homes have been built to date and 564 condominiums built to date. (MPC March 15, 1976).'

"The precise timing of development at Big Sky and the final peak load to which it will grow are not certainties. However, the major consideration at present is that additional transmission capacity to Big Sky is already needed." (Emphasis added.)

In the final EIS in the instant case, we note the Department did address the need for additional power at Big Sky:

"With respect to Big Sky, Department studies indicate that Big Sky peak demand has in the past reached the capacity of the existing 69 KV line. Table 3-1 on page 13 of the Draft EIS lists the capacity of the Big Sky-Bozeman line as 9 MW. Table 2 contains the historical Big Sky peak demand data supplied by the applicant. The Big Sky load at the Jack Rabbit substation, which is the total Big Sky load (MPC March 15, 1976), was 9048 KW in December 1974, December 1975, and January 1976. Because the capacity of the existing line has been reached, and because growth in electrical demand will continue at Big Sky, the Department must recognize the need for additional transmission capacity to Big Sky." (Emphasis added.)

The final EIS also reflects that other alternatives were examined: "The need for additional transmission

capacity to Big Sky, which the Department in this case acknowledges, does not necessarily indicate a need for new transmission lines. Other alternatives exist: addition of voltage compensation equipment, upgrading the existing line by increasing conductor size while retaining the existing voltage level, and rebuilding the existing line at a higher voltage level. Neither of the first two of these alternatives would provide sufficient capacity to meet the peak projected long-term demand at Big Sky, nor would a combination of the two. Their implementation would therefore mean unnecessary additional expense to all Montana Power Company electrical consumers. Either upgrading the existing line to 161 KV or building a new 161 KV line would result in less energy loss during transmission (see page 59 of the Draft EIS), and provide capacity beyond the projected maximum peak power demand of 32 MW at Big Sky. Construction of a new 161 KV transmission line is the most appropriate alternative, however, to meet the need for the additional transmission capacity (see Section I.C.3.)." (Emphasis added.)

[4] or the foregoing reasons we hold that the Environmental Impact Statements in this case are not grossly in-
sufficient as a matter of law in their treatment of the need for and alternatives to the proposed transmission line. The primary function of the EIS is to provide the decision-maker with environmental reports sufficiently detailed to allow a knowledgeable judgment and to allow public feedback in the development of that information. We cannot say that the Board's decision was arbitrary, capricious or clearly erroneous in view of the EIS's and documents that it had before it.

Appellants next attack the EIS's on the grounds that they failed to address or discuss the alternative of a second 69 KV line going through the Gallatin Canyon in addition to the existing one. Appellants contend that this alternative came into being when it developed during the hearings that the additional 15 megawatts projected by MPC was to serve only peak demands at peak times of the year. Hearings officer Andriolo suggested the possibility of two 69 KV lines to the Board in the September 16, 1977, hearing. In the draft EIS, we find there is consideration of higher kilovolt lines being routed from the Bozeman-Hot Springs substation through the Gallatin Canyon to Big Sky. The Department found, however, that sole reliance on one substation would present reliability disadvantages (in case of an outage at that substation) which would not be present in a transmission line from Dillon to Ennis to Big Sky. Two 69 KV lines from Bozeman to Big Sky would suffer the same infirmities as a higher kilovolt line along the same route.

[5,6] The Dillon area receives its power from three different sources and, in an emergency, Big Sky could be served by the Madison hydro plant near Ennis. In case of an outage at any one substation, electricity from the other areas could be drawn upon to prevent a total power failure. The fact that the EIS's did not specifically consider the possibility of a second 69 KV line through Gallatin Canyon does not render them insufficient as a matter of law. Again, it is not required that an agency perform an exhaustive study of every possible alternative:

"What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned." NRDC v. Morton (1972 D.C.Cir.), 458 F.2d 827, 836.

Appellants further contend that the Department should have addressed the "no action" alternative in considering MPC's proposed alternative. [7,8] It is clear that agencies must consider the "no action" alternative, see Life of the Land v. Brinegar, supra. However, this claim of appellants is similar to that attacking the Department's purported acceptance of MPC's load projections and our response thereto is relevant here. It is clear that the Department has correctly reversed its earlier position in that it now considers ways that the need for a proposed facility can be eliminated, ARM, section 36.7.304(1)(b)(ii) & (b)(B), supra. Here the Depart-ment implicitly determined that the "no action" alternative would not be satisfactory, as in the final EIS this is stated:

"The current need for additional electricity at Big Sky has been established, and according to the Big Sky Master Plan, the corporation desires increased development, and hence, increased electrical consumption." (Emphasis added.)

Appellants next challenge the EIS's on the ground that they do not contain an adequate cost/benefit analysis, viz., the Department should have considered the relative costs and benefits of the proposed facility in comparison with available alternatives. Appellants quote House Joint Reso-lution No. 73 which provides in pertinent part:

"That all agencies of State government are hereby directed to achieve forthwith the full implementation of the Montana Environmental Policy Act including the economic analysis requirements of Section 69-6504 through 69-6514 . . . and

"BE IT FURTHER RESOLVED, that economic analysis shall accompany environmental impact statements as required by the foregoing Sections of the act and shall encompass an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs and the distribution effects. . ."

[9] A joint resolution is not binding as law on this Court, but we give it consideration as clear manifestation of the legislative construction of MEPA. State v. Toomey (1959), 135 Mont. 35, 335 P.2d 1051; State ex rel. Jones v. Erickson (1926), 75 Mont. 429, 244 p. 287.

The cost-benefit analysis required by MEPA, as construed by the legislature, encompasses a broad consideration of several factors categorized in House Joint Resolution No. 73, approved March 16, 1974. A reasonable cost-benefit economic analysis undertaken pursuant to these criteria would, in effect, accomplish most of the purposes sought to be served by an environmental impact statement.

Appellants concede, however, that the Department's draft EIS undertakes an analysis of the indirect costs and benefits of MPC's proposal although not of the type appellants suggest.

Neither the Siting Act nor MEPA explicitly requires such type of analysis. It should also be noted that after the draft EIS appeared, the Department promulgated rules which require EIS's prepared by the Department to include the following:

"(e) economic and environmental benefits and costs of the proposed action (if a benefit-cost analysis is considered for the proposed action, it shall be incorporated by reference or appended to the statement to aid in evaluating the environmental consequences);

"(f) the relationship between local short term uses of man's environment with the effects on maintenance and enhancement of the long-term productivity of the environment;"

MPC argues that MEPA does not require a formal and mathematically expressed cost-benefit analysis, citing Cady v. Morton (9th Cir. 1975), 527 F.2d 786.

[10] On this point we hold there has been sufficient compliance with MEPA so that the EIS is not insufficient as a matter of law. Although this area could have been more fully explored by the Department in preparing the EIS, the EIS's, when viewed in their entirety, sufficiently apprised the Board members of the project's cost and benefits to enable the Board to render a knowledgeable decision.

Appellants next charge that a deficient EIS cannot be rendered sufficient by reference to the record outside the documents. The trial court concluded that ". . .the entire Siting Act process and the Board's decision based upon the entire record is the functional equivalent of an Environmental Impact Statement."

Since we have held that the environmental impact statements are not insufficient as a matter of law, we need not address nor determine the issue of functional equivalency. In sum, we hold that the record before us establishes that the Board's decision was not clearly erroneous, arbitrary or capricious; that substantial evidence supports the Board's findings and order; and that appellants' rights were not substantially prejudiced. We observe that tested by hind-sight, it is not uncommon to uncover technical shortcomings in an environmental impact statement or to point out areas therein that might have been investigated or analyzed in more detail. However, where appellant's rights are being prejudiced by substantial deficiencies in an EIS it is no less an obligation of appellants to spell out in some detail such deficiencies to enable the Department to correct the same prior to the Board hearing and adjudication which was not done here. Otherwise the whole process of certification would be needlessly drawn out and postponed to the point that such certification would become economically prohibitive, a mockery, and illusory.

With regard to the second issue (whether the Board's findings, conclusions and Certificate of Environmental Compatability and Need are statutorily adequate and supported by the evidence), we reiterate the circumscribed nature of our standard of review under MAPA. We will reverse or modify the decision below if the judgment is clearly erroneous or arbitrary or capricious or characterized by an abuse of discretion, Section 2-4-704(2)(e) & (f), MCA. In Western Bank of Billings v. Montana State Banking Board (1977), 174 Mont. 331, 340, 570 P.2d 115, 1120, we state:

"This Court has repeatedly held that its function on appeal is to determine whether there is substantial evidence in the record to support the judgment. Strong v. Williams (1969), 154 Mont. 65, 460 P.2d 90." Appellants contend there was insufficient evidence in the record on the need for a 161 KV line in the Upper Madison/Lower Ruby valleys and at Big Sky; that there was no evidence to support the finding and conclusion that the proposed line and routing constituted the minimum environmental impact; that the Board failed to comply with MAPA in issuing its findings of fact, and conclusions of law; and that the Board's Certificate of Environmental Compatability and Public Need violates section 75-20-303(3), MCA, of the Siting Act.

Appellants first contend that there was insufficient evidence of need for the 161 KV line in the Upper Madison/ Lower Ruby valleys. The Board's finding of need regarding this states as follows:

"Although the need for the Bozeman to Ennis and Dillon segment of the transmission facilities is not as immediate as the Gardiner-Clyde Park segments of the link, existing transmission facilities in the Ruby and Madison Valleys are reaching their capacity limits and with population growth and increased electrical demands due to intensive sprinkler irrigation a definite need exists for an additional reliable electrical transmission facility. The completion of this leg of the project also provides for a fully integrated electrical transmission system to serve the entire area. Conversion of existing facilities in the Madison and Ruby Valley areas would provide only short-term solutions that would result in economic waste. The best long-term solution to the electrical needs of the area and projected growth patterns is achieved through a 161 KV system proposed by the applicant with the 69 KV system from Emigrant to Gardiner." (Emphasis added.)

[11,12] Appellants concede that there is evidence to support the underlined portion of the above finding but argue that there is no support for the contention that a 161 KV facility is required to meet these needs. Although there was a substantial conflict in the record concerning the amount of power actually needed in the

Upper Madison/Lower Ruby valleys, there was substantial evidence to support the Board's decision. It was the function of the Board to resolve these conflicts and we may not substitute our judgment for that of the Board on the weight of the evidence on questions of fact, section 2-4-704(2), MCA. Substantial evidence supported the Board's determination that a 161 KV facility was needed in the Upper Madison/Lower Ruby valleys. The record is replete with facts indicating that the existing transmission lines were overloaded; that only a 161 KV line would provide long-term, cost-effective service and that the needs of Vigilante Electric Cooperative which used MPC electrical transmission lines required a 161 KV line.

Appellants next contend that there was insufficient evidence of need for a 161 KV line to Big Sky and that the evidence does not support the following findings made by the Board; that available load growth information for MPC's systems supports their forecast covering future load growth for both peak and average energy; that conservation activities will not materially reduce the demand for power in the service area; that the benefits derived from the utilization of waste heat do not outweigh the advantages of the electric transmission line; that new technologies (under-grounding, on-site generation, solar energy, wind power and total energy systems) have not reached a point where they present a feasible economic and environmental alternative to the proposed facility; and that there are no viable sources of alternative energy.

[13] We disagree. We hold there was substantial evidence to support the Board's findings.

The Board's finding No. 17 contains underlying facts (which were before the Board) from which the Board could conclude that there will be significant future development and consequent electrical need at Big Sky as well as the Gallatin Canyon area as a whole (which will also be served by the proposed line):

"That the Big Sky Resort and Gallatin Canyon can be considered as a separate growth consideration and projections. Big Sky's master plan shows a projected 2,700 condominiums and 1,263 lots. At present, only 21 % of the condominiums are constructed and 52 % of the lots are developed while not all of the condominiums have been sold or are in use. In addition, Big Sky is based on an 'all electric' concept and electricity is needed for the hostels, medical center, fire department, restaurants and other commercial facilities as well as the ski lift, swimming pools and golf course. While growth of the Big Sky facility has declined considerably due to the economic market, future growth can be anticipated of a substantial nature. In addition to the Big Sky resort, satellite developments such as ICBI which has purchased 45 acres and has an option on 111 acres near Big Sky plans 200 residential condominiums, together with shopping and commercial facilities. In view of this activity, additional development in the Gallatin Canyon area can also be anticipated." (Citations omitted - emphasis added.)

In finding No. 18, the Board noted that the projections had twice been revised due to adverse economic conditions but stressed the increased needs of the Gallatin Canyon area and other areas adjacent to Big Sky.

Next, there was substantial evidence adduced at the hearing from which the Board could conclude that conservation activities would not materially reduce the demand for power. Appellants urge that twice as much insulation could cut the heating load at Big Sky in half. However, one witness stated that the Big Sky condominiums were better insulated than most Montana buildings. From the design plans of Big Sky, which were contained in the draft EIS, the Board could have reasonably concluded the conservation practices at Big Sky had progressed to such a point that more of such practices would not materially reduce the need for more power. The Board made the following findings with regard to the use of waste heat and on-site electrical generation:

"20. On-site generation by a gas turbine generator or diesel power generation with utilization of waste heat has been proposed by the Montana Wilderness Association as an alternative for a power line to Big Sky. Fuel costs for on-site generations would be fourteen times as much as fuel costs associated with production of electricity at a central station such as Colstrip. Further, on-site generation would not relieve the reliability problems which would be relieved by a loop system coming in from the Ennis area and connecting with the existing line up the Gallatin Canyon. Nor would it have the benefit of serving the related developments in the area such as ICBI and other developments in the Gallatin Canyon area. Although utilization of waste heat appears to be a feature that should be considered in future developments, the benefits to be derived therefrom in connection with the Big Sky project are not so significant as to outweigh the advantages of the electric transmission line.

"21. In view of the energy crisis in the petroleum industry it is not felt that on-site generation would be a feasible long-term alternative. Major emphasis is being placed upon utilization of electrical power without the undue consumption of our natural petroleum resources and on-site diesel or gas turbine generating facilities would be detrimental to this policy. Coal would not serve as a feasible alternative for on-site generation due to the transportation requirements and environmental problems encountered in an area of this type by the utilization of coal for the production of electrical energy. No available hydroelectric site exists in the general area." (Emphasis added.)

In finding No. 28, the Board found that, although new technologies such as undergrounding, solar and wind power might be used to minimize adverse environmental effects, the development of the same had not reached a point where they presented a viable economic alternative to MPC'S proposed facility.

[14] These findings were supported by evidence of fuel costs from which the Board could have concluded

that onsite generation was not a financially feasible alternative. Similarly, evidence that waste heat in a total energy system is used in downtown Manhattan and in several buildings in Missoula does not require the Board to accept that method as desirable at Big Sky and therefore reject the proposed transmission line. The same reasoning obtains for the alternatives of solar and wind power as well. Appellants' related attack on the Board's findings that there are no viable sources of energy to replace that which would be provided by the electrical transmission line is disposed of by these considerations also, i.e. the Board is not bound to recommend that Big Sky use alternate sources of energy because others have used them successfully.

Appellants further challenge the findings relating to the route for the transmission line with the least amount of adverse environmental impact. The Board found that on the Bozeman to Ennis to Dillon segment of the line, the preferred corridor route was that of the applicant's, while on the Big Sky segment of the line, the Ennis-Jack Creek-Big Sky corridor was the most preferred route, the Ennis-Cedar Creek-Big Sky corridor the next most preferred corridor and the Gallatin Canyon route, from Bozeman to Big Sky,the third most preferred route. Appellants claim that such findings are either unsupported by the evidence or entirely contrary to it. We disagree. For example, the Board had before it evidence showing the Gallatin Canyon area was more highly populated than the Jack Creek or Cedar Creek area. Thus a bigger transmission line through Gallatin Canyon area would be viewed by more people and be aesthetically less pleasing. The Board also had before it charts and state-ments showing the number and duration of outages that had occurred at Big Sky in recent years and the fact that any transmission line through Gallatin Canyon would probably use the Bozeman-Hot Springs substation. Thus an outage at that substation would have a considerably greater impact on Big Sky than if the resort were served by another energy resource as well, i.e., electricity coming from the Dillon/Ennis area through Jack Creek or Cedar Creek. The draft EIS contains additional support for the Board's conclusion favoring MPC's proposed route from Bozeman to Dillon.

[15] Appellants next argue that the Board's findings and conclusions fail to comply with sections 2-4-623(1), (3), (4), MCA, of MAPA which provide: Final orders - notification - availability.

"(1). . .Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

". . .

"(3) Each conclusion of law shall be supported by authority or by a reasoned opinion.

"(4) If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding."

Appellants contend that the findings are in violation of section 2-4-623(4), MCA, because all parties here submitted proposed findings of fact and conclusions of law and the Board did not explicitly rule on each finding and each conclusion. This argument exalts form over substance. We do not construe the statutes so narrowly or technically. To do so would place an onerous burden on the Board, especially when it is remembered that usually these types of hearings involve multiple parties representing various interests and each party normally submits its own findings and conclusions. The findings and conclusions here implicitly rule on the findings and conclusions submitted by the parties and we find them to be sufficient in this case. Moreover we have previously held that section 2-4-623(4), MCA, does not require a separate, express ruling on each required finding as long as the agency's decision and order in such proposed findings are clear, Montana Consumer Counsel v. Public Service Commission and Montana Power Co. (1975), 168 Mont. 180, 541 P.2d 770.

[16,17] Appellants also claim that a number of the Board's findings merely "parrot" several sections of the Siting Act without setting forth the underlying facts, in violation of section 2-4-623(1), MCA, supra. We agree that some of the findings do track several statutes in the Siting Act. This alone does not render them insufficient provided the underlying factual basis is apparent. While each finding is not immediately followed by the supporting underlying facts, when the findings and decision are viewed as a whole, it will be seen that the findings are adequately factually supported. It would be an unnecessary and idle act to remand for correction of any technical deficiency where the record discloses an underlying factual basis for each finding. The law does not require idle acts. Section 1-3-223, MCA. [18] Appellants contend that each of the Board's conclusions of law are not supported by authority or by reasoned opinion and therefore violate section 2-4-623(3), MCA, supra. We disagree. Again, while it is true that each conclusion of law is not immediately followed by an authority or opinion, such is not required. The conclusions here are sufficiently supported by reasoned opinion to render their basis reasonably ascertainable. These conclusions are supported by the findings of fact which we have previously approved.

Appellants also argue that the Board's Certificate of Environmental Compatability and Public Need violates section 75-20-303(3), MCA, which provides:

"(3) Any certificate issued by the board shall include the following: "(a) an environmental evaluation statement related to the facility being certified. The statement shall include but not be limited to analysis of the following information:

"(i) the environmental impact of the proposed facility; "(ii) any adverse environmental effects which cannot be avoided by issuance of the certificate;

"(iii) problems and objections raised by other federal and state agencies and interested groups;

"(iv) alternatives to the proposed facility;

"(v) a plan for monitoring environmental effects of the proposed facility and

"(vi) a time limit as provided in subsection (4), during which construction of the facility must be completed;

"(b) a statement signed by the applicant showing agreement to comply with the requirements of this chapter and the conditions of the certificate." [19] While the pages of the Certificate itself do not comply with the above statute, we note that, in the second paragraph, the Certificate fully incorporates by reference the Board's findings, conclusions and order. Taken together these two documents fulfill the requirements of section 75-20-303(3), MCA, supra.

Directing our attention to the third issue, appellants argue that they were denied the due process guarantee of a fair and impartial tribunal because of Sabol's participation in the proceedings both as a board member and a hearing officer. Appellants allege that Sabol had a pecuniary interest in the outcome of the case because he was retained as legal counsel by Ski Yellowstone Inc., during his term of chairman of the Board of Natural Resources and Conservation. Appellants claim this created a conflict of interest in that whatever the Board decided in connection with providing additional electrical transmission facilities and services to Big Sky would establish a precedent in any future facility siting request concerning Ski Yellowstone, Inc.

Appellants' second ground for Sabol's alleged bias involved a newspaper article on February 15, 1976. In the article Sabol was quoted as saying that some environmental groups were losing credibility by opposing all development projects and MWA was specifically mentioned. The article appears below:

"SOME ENVIRONMENTAL GROUPS
LOSING CREDIBILITY
SABOL SAYS
By Larry Wills
Chronicle Staff Writer

"The Chairman of the Board of Natural Resources has charged that some environmental groups are losing credibility in opposing all development projects.

"Joe Sabol, a Bozeman attorney, and head of the volunteer state board that reviews all major utility construction charged that some groups are automatically opposed to all developments no matter how good or bad they may be.

" 'I think it is time that these groups re-assess their positions on some proposals,' he said.

" 'Some proposals are good, and some are not, but they are opposed to all projects, and are creating a polarization of attitudes,' Sabol charged. "The attorney said the opposition to all projects is a loss of perspective and concentrates on the 'trivia' that surrounds a project. "Sabol made his charges during an informal press conference concerning demands that he resign his resource board position due to conflict of interest.

"The charges from the Montana Wildlife Federation and the Montana Wilderness Association stemmed from Sabol's working for the Ski Yellowstone development, and also sitting as chairman of the resource board. "Sabol said flatly he saw no conflict, and would not quit until he believed there was a conflict of interest. "He said he did not take the job as Ski Yellowstone attorney until he was assured that the position was not in conflict, and that the project itself was satisfactory in his own mind. "He also said he received assurances from the governor that the two positions would not be in conflict.

"Sabol also said the Ski Yellowstone issue has never come up at board meetings, and that no Ski Yellowstone official has ever approached him as a member of that board.

"The attorney was asked to quit his post in letters that the MWA and Wildlife groups sent to Gov. Judge.

"Sabol defended the resort as one that is better than most in alleviating bad environmental effects, and said the proposal should be recognized for its accomplishments.

"Referring to two environmental groups' opposition of the resort, Sabol said, 'They can't find anything wrong with the merits of Ski Yellowstone, so they attack the people.'

"The letters were sent to Judge after Sabol wrote the governor and Wes Woodgerd, head of the Fish and Game Commission objecting to 'propaganda' against the resort planned on the north shore of Hebgen Lake. "Sabol objected to a grizzly bear presentation which the attorney said implied the resort would interfere with the bears' habitat. Sabol charged there is no proof that the Hebgen area is habitat for the bear. "Also questioned was a Fish and Game employee's 'free-lancing' articles while on the state payroll. The attorney referred to articles printed in a Denver paper against the resort.

"The net result of the three-year delay for the resort, Sabol said, is that it is driving other developers out of the state. The proposal is still under study by the Gallatin National Forest.

" 'The legislature and the environmentalists have done what they set out to do, minimize development,' he said." (Emphasis added.)

Appellants also claim that during a recess in the Board hearing on September 24, 1976, Sabol instructed the attorney for the Department of Natural Resources and Conservation not to cross-examine the witnesses for MWA because its counsel was trying to make a record for appeal. Appellant argue this demonstrates actual bias on the part of Sabol.

We note that Sabol participated as hearings officer for the Board from April 10, 1976, to September 1, 1976. During this period two prehearing conferences were held on April 10, 1976, and May 12, 1976. At the second prehearing conference, Rick Applegate, a MWA and EIC member, filed an affidavit seeking disqualification of Sabol as a hearing officer and member of the Board considering MPC's application. On September 1, 1976, Sabol removed himself as hearings officer but declined to remove himself as a member of the Board. The Board voted unanimously to deny the at tempted disqualification.

Appellant cites Withrow v. Larkin (1975), 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712, for the proposition that the constitutional due process guarantees apply to administrative agencies as well as the courts. While it is true that language supporting that premise appears in Withrow, the actual holding of that case involves the question of whether the Wisconsin Doctors Examining Board had the power to investigate unprofessional conduct as well as adjudicate it. Nowhere in Withrow do we find any facts similar to the case at bar, i.e., where the alleged bias of one of the decision makers is at issue.

Appellant also cites Taylor v. Hayes (1974), 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897, for authority that actual bias is unnecessary and that the appearance of bias is sufficient. The facts in Taylor were that at the conclusion of a Kentucky murder trial, the presiding judge sentenced one of the lawyers to four and one-half years in prison for nine counts of contempt occurring during the trial and barred him from practicing before that court. The Supreme Court found that to so rule without notice and hearing violated the lawyer's procedural due process rights. The court also found that the lawyer's contempt trial should be before a differentjudge because the original trial judge had become embroiled in a running controversy with the lawyer.

This Court has stated its position clearly with regard to biased decision makers:

"[It is] this court's desire to zealously guard the right to fair and impartial hearings. It is not necessarily the fact of bias that concerns us but the possibility that bias might exist. . .

"[W]e do warn . . . all administrative boards and tribunals that they should zealously guard against any appearance of unfairness in the conduct of their hearings." State ex rel. Fish v. Industrial Accident Board (1961), 139 Mont. 246, 248-49, 251, 362 P.2d 852, 853, 855.

Accord, Graham v. Tree Farmers Inc. (1963), 142 Mont. 483, 385 P.2d 83. Nonetheless, the holdings both in Graham and Fish, supra, state that substantial rights of the aggrieved party must have been prejudiced before the court will censure an administrative board for the conduct of a hearing. The Supreme Court in Graham, supra, stated:

"We are constrained here, while disapproving the use of Mr. Wood as a hearings officer, in view of the preponderance of proof in this record, to fail to see where any different result could be reached and for that reason we feel the error to be such that it does not call for a reversal and further hearings so far as the claimant is concerned." (Emphasis added.) 142 Mont. at 497, 385 P.2d at 90.

In taking a closer look at the possible influence of Sabol's activities on the board's ultimate decision, we find the following: Sabol presided at the first prehearing conference on April 10, 1976, at which time the routing and need for the transmission lines as well as witnesses and discovery were discussed among the various lawyers. Sabol also presided over the second prehearing conference on May 12, 1976. At this conference the lawyers exchanged witness lists and discussed depositions, the order of appearance of the parties and deadlines for exchanging interrogatories and written

statements. During the summer of 1976, the Department moved to bifurcate the hearing into two hearings. Also, both MWA and MPC moved to have the Board view the Gallatin Canyon area and MWA added the Ennis to Big Sky route as well. All three motions were argued at the September 1, 1976, hearing and the motions to view were granted but the motion to bifurcate was denied. It was at this September 1 hearing that Sabol removed himself as hearings officer with Andriolo being substituted for him. The actual hearings on the issuance of the Certificate of Environmental Compatability and Public Need took place on September 23 and 24, 1976. It was during a recess at the September 24 hearing that Sabol allegedly told the Department attorney not to cross-examine the MWA witnesses. Sabol's term as a Board member expired on December 31, 1976.

On February 9, 1977, Andriolo issued an order that all parties' proposed findings of fact and conclusions of law be submitted by March 1, 1977, with arguments thereon April 21, 1977, before the Board. On September 16 and October 28, 1977, the Board discussed and approved Andriolo's findings and conclusions. The statutes relating to the Board's and hearings examiner's duties are set out below:

"(9) At the conclusion of the hearing, the hearing examiner shall declare the hearing closed and shall, within 60 days of that date, prepare and submit to the board and in the case of a conjunctive hearing, within 90 days to the board and the board of health or department of health proposed findings of fact, conclusions of law, and a recommended decision." Section 75-20-220(9).

"75-20-301. Decision of board - findings necessary for certification. (1) Within 60 days after submission of the recommended decision by the hearing examiner, the board shall make complete findings, issue an opinion, and render a decision upon the record, either granting or denying the application as filed or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the facility as the

board considers appropriate." [20] While we do not approve of the alleged directions not to cross-examine the MWA witnesses, we fail to see how, on the record before us, the Board would have reached a different result had Sabol removed himself entirely from the proceedings, Graham, supra. He did not participate in the Board's deliberation or discussion of the final decision, as evidenced by sections 75-20-220(9) and 75-20-301(1), set out above. Under these statutes the Board's deliberations occur after the hearings examiner submits his proposed findings and conclusions and a recommended decision. This was done in 1977, after Sabol's term on the Board expired.

The Board's decision was not rendered until October 26, 1977, and carried with four Board members voting in favor of MPC's application, one member against it, and the chairman did not vote. We fail to see how Sabol's alleged bias prejudiced the substantial rights of the appellant. Similarly, we fail to see how Sabol's connection with Ski Yellowstone, Inc. resulted in the appellants' receiving any less than a fair hearing and decision. The argument that a "precedent" will be set by granting MPC its transmission lines to Big Sky is tenuous at best and the fact that a devel-oper must bear the first cost of conservation alternatives in lieu of additional electrical transmission facilities does not persuade us that Sabol had a pecuniary interest in the present proceedings.

With regard to the newspaper article appearing in the Bozeman Daily Chronicle, we note that none of the cases cited by appellants (which deal with a member of a hearing panel criticizing a party already before it) are on point in the instant case. Here Sabol's comment appeared February 15, 1976, and the first prehearing conference was not until April 10, almost two months later. They do not reflect any prejudgment of the issues placed before the Board in this case.

Appellants argue that Sabol improperly interfered with the conduct of the September 24, 1976, hearing by the alleged ex parte contact in the lobby during one of the recesses with Department of Natural Resources and Conservation attorney MacIntyre. However, the depositions of Doug MacIntyre and Applegate indicate that appellants wanted the DNRC to conduct "friendly cross-examination," i.e. the MWA and DNRC occupied similar positions in the proceedings and were aligned on the corridor issue- both advocated the existing Gallatin Canyon corridor rather than the Jack Creek/Cedar Creek route. We have previously held that no substantial rights are prejudiced by a hearing officer's decision to limit cross-examination to those issues on which routes are adverse, because the "cross-examination" of nonadverse parties in reality becomes just more direct examination. Northern Plains, supra.

Although neither party has raised the issue, section 75-20-220(1), MCA, merits some discussion. That statute provides in part:

"75-20-220. Hearing examiner - restrictions - duties (1) If the board appoints a hearing examiner to conduct any certification proceedings under this chapter, the hearing examiner may not be a member of the board, an employee of the department, or a member or employee of the department of health or board of health." Under this statute, a hearing examiner may not be a member of the Board and Sabol was chairman of the Board at the time he was appointed hearing examiner. However, close examination of the enactment of the above statute and the facts of this case reveal that the statute did not apply to this proceeding.

MPC filed its application on June 6, 1974, for a 161 KV line from Clyde Park to Dillon. On June 30, 1975, MPC filed an amended application increasing the total mileage of transmission lines requested and under the amended application, the line was to consist of the five segments set out at the beginning of this opinion. The Department, by letter dated May 30, 1975, agreed to treat the amended application as relating back to the original (June 6, 1974) application. That letter contained the following statements:

"The project application shall. . .be deemed to have been filed on June 6, 1974. . . [T]he Department. . .will not treat the amended applications as constituting a substantial change and, therefore, will not treat the amended applications as a new application. . ."

[21] Section 75-20-220(1) was included as part of the amendments to the Utility Siting Act and it was expressly provided that those amendments would only apply to applications received by the Department after January 1, 1975. 1975 Laws, Ch. 494, sec. 25. MPC's application was filed on June 6, 1974, and, due to the relation back discussed above, the amended application was deemed to have been filed on that date also. Thus the statute is not applicable to the proceedings here.

Furthermore, the parties and the hearing examiner agreed that they were operating under the Utility Siting Act and not the amendments thereto. In the transcript of the third preconference hearing conducted September 14, 1976, we find the following interchange:

"HEARINGS EXAMINER: . . .

"Now the first thing, it is my understanding that everybody is agreed that the hearing will be conducted under the provisions of the Utility Siting Act of 1973 rather than the Major Facility Siting Act which was enacted in 1975, I believe. Is that correct?

"MR. WALSH [representing MPC]: That is correct.

"HEARINGS EXAMINER: And how about you, Bill? Is that agreeable to you? "MR. MADDEN [representing MWA]: That is correct.

"HEARINGS EXAMINER: And how about you Jim? Is that agreeable to you? "MR. MOORE [representing

American Fork Ranch]: Yes."
In the transcript of the September 23 hearing we also find this:

"HEARINGS EXAMINER: Thank you, Mr. Sabol. This is a hearing under the Utility Siting Act of 1973, and the proceedings under this, at this hearing will all be in conformity with that particular Act."

For the above reasons, it is our opinion that section 75-20-220(1), MCA, did not apply to these proceedings.

Affirmed:

MR. JUSTICES DALY, HARRISON and WEBER concur.

MR. JUSTICE SHEEHY, deeming himself disqualified, did not participate. MR. JUSTICE MORRISON dissenting:

I respectfully dissent. The draft environmental impact statements are grossly inadequate for failure to analyze need and explore alternative sources for satisfaction of need.

Montana's Environmental Policy Act (MEPA) , section 75-1-201, MCA, 1981, requires preparation of an environmental impact statement concerning the following matters:

(1) the environmental impact of the proposed actions;

(2) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(3) alternatives to the proposed action;

(4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. The Montana Major Facility Siting Act recognizes that certain utility "facilities," as defined by the Act, have an effect upon the environment to the extent that construction is prohibited "without a certificate of environmental compatability and public need" acquired pursuant to the provi-sions of the Act. Section 75-20-102, MCA, 1981. Section 75-20-301(2), MCA, of the Act provides that a certificate of environmental compatibility and public need may not be approved by the Board of Natural Resources, except upon a finding and determination by the Board of, among other things:

(1) the basis of need for the facility;

(2) the nature of the probable environmental impact;

(3) that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives;

(4) each of the criteria listed in 75-20-503.

Section 75-20-503, MCA, enumerates more than 60 environmental factors to be studied in determining whether a proposed facility should be approved. That section requires, in part, that the following be considered: energy needs including growth in demand and projections of need; availability and desirability of alternative sources of energy in lieu of the proposed facility; conservation activities which could reduce the need for more energy.

The Facility Siting Act imposed upon the Department of Natural Resources the responsibility for undertaking technical studies and evaluations of the statutorily mandated environmental factors. Section 75-20-503 and 75-20-216(4), MCA, 1981. The Department of Natural Resources has the responsibility to formalize its technical studies in an environmental impact statement which it must file with the Board, to be used by the Board in making findings and determinations required under section 75-20-301, MCA.

The "report" required of the Department of Natural Resources under the Facility Siting Act, section 75-20-216(4), MCA, serves as the basic technical and evidentiary document upon which the Board must rely in making its find-ings and determinations under section 75-20-301, MCA, as to whether a certificate should be granted or denied. Any substantial deficiencies in the required documents should invalidate the Board's findings and decision.

Both the Siting Act and MEPA require the Department's draft and final environmental impact statement to consider the need for alternatives to the proposed facility. In this case, the environmental impact statements make no attempt to consider either the need for or alternatives to a 161 KV facility to service Montana Power Company's projected electrical demands in the Upper Madison/Lower Ruby Valleys.

The DEIS did not adequately study the need for, and alternatives to, a 161 KV facility at Big Sky, Montana. The existing 69 KV line servicing Big Sky has a capacity of 9 megawatts which could, with modification, be increased to a maximum capacity of 12-15 megawatts. In its application for certificate to construct the 161 KV transmission line to Big Sky, Montana Power Company submitted that such a facility was needed to serve projected electrical loads at Big Sky of 30 megawatts. A 161 KV line has a carrying capacity of 200 megawatts. The Department's draft environmental impact statements accept Montana Power Company's load growth projections without question. Neither document makes any attempt to evaluate the basis of the projected load. There is no analysis of the types of energy demands at Big Sky which are expected to increase and, therefore, which could justify additional electrical transmission service. Such an analysis is critical. Energy demands for heat are not constant. They occur only during the winter and are heaviest only at certain times of the day. Furthermore, energy demands for heat do not require electrical service in that they can be

met through other lower grade energy sources, including better conservation practices. These matters were not studied.

The evidence produced at the hearing before the Board of Natural Resources disclosed that all but 5 megawatts of required electrical power could be met through conservation alternatives not requiring additional electrical service. Five megawatts is well within the capacity of on-site diesel generation or a smaller transmission line. A 161 KV line, with a
carrying capacity of 200 megawatts, 195 megawatts in excess of that actually needed at Big Sky, seems clearly to not be needed. The failure of the draft environmental impact statements to address the actual need and existing alternatives renders them totally deficient.

The District Court recognized the gross inadequacies in the draft environmental statements but held such deficiencies to not constitute a basis for reversal of the Board's decision. The District Court said "that the entire siting act process and the Board's decision based upon the entire rec-ord is the functional equivalent of an environmental impact statement." No authority is cited for this proposition.

The Facility Siting Act requires that "the Department shall make a report to the Board which shall contain the Department's studies, evaluations, recommendation and other pertinent documents resulting from its study and evaluation. . ." Section 75-20-216(4), MCA, 1981. The function of the statement is to perform technical analysis and provide expert documentation to the Board because the Board lacks technical expertise to perform this function itself.

The Federal Courts have refused to adopt the rationale here adopted by the trial court. In Environmental Defense Fund, Inc. v. Froehlke (8th Cir. 1972), 473 F.2d 346, the Corps. of Engineers argued that although discussion of alternatives in its EIS was deficient, the EIS should be considered sufficient when viewed against the entire record. In rejecting this argument, the 8th Circuit Court of Appeals said:

"The Corps. argues that despite these omissions, its impact statement should be considered sufficient because 'at every step of the way, from preauthorization studies through detailed project planning, which includes recent environmental and mitigation studies, the voices of fish and wildlife interests have been heard, considered and reported to Congress.' We disagree. Nothing less than a complete impact statement can serve the important purposes of section 102(c)(iii) of MEPA. As the District of Columbia Circuit Court stated in Natural Resources Defense Counsel, Inc. v. Morton, 458 F.2d 827, 834 (D.C.Cir.1972), 'it is the essence and thrust of EPA that the pertinent Statement serve together in one place a discussion of the relative environmental impact of alternatives.'

". . .

"A statement which includes a detailed discussion of all reasonable alternatives to a proposed project and their effects [case citation omitted] insures that agency officials will be acquainted with the tradeoffs which will have to be made if any particular line of action is chosen." The rationale adopted by the District Court to render the DEIS deficiencies harmless error, has the effect of nullifying the statutory requirement for environmental impact study.

Unlike the District Court, the majority here attempts to defend the DEIS as adequate. Not even the Department which prepared the statements can defend them. The majority admits:

"The Department, in its briefs to the District Court and to this Court, acknowledges that the EIS's contain no adequate consideration of alternatives to a 161 KV line serving the Upper Madison/Lower Ruby Valleys. The Department justifies this omission by stating that MPC failed to comply with the Siting Act and the rules adopted pursuant thereto in identifying in MPC's application the need for a facility to serve the demand in the Upper Madison/Lower Ruby Valleys."

The majority then proceeds to gloss over the deficiencies in a style that approaches advocacy. Apparently, the law now will forgive and approve the Department's deficiencies that result from omissions in the Utility's application. The decision here has established a precedent which substan-tially weakens the Facility Siting Act and tends to judicially erode the environmental protection assurances afforded by the Montana Legislature.

I view the course of action now being taken by this Court to be premised upon expediency. It is true that the process is cumbersome but had the Montana Power Company made a complete application, and had the Department of Natural Resources thereafter rendered draft environmental impact statements in conformity with law, these problems would not have arisen. By this decision we reward the wrongdoers.

I register a strenuous dissent.

MR. JUSTICE SHEA, dissenting:

I join in the dissent of Justice Morrison. Because of time exigencies, I am unable to write a more detailed dissent at this time, other than what I state below. Time permitting, I will add a more detailed statement of why I dissent.

The situation is that MPC has been permitted, without a showing of need or of alternatives, to expand the power available to Big Sky from a 69 KV line to a 161 KV line, in a situation where even in the untested application, the MPC has projected that Big Sky will need only 39 KV.

The current 69 KV line to Big Sky has a capacity of 9 megawatts. With modification, this line could be increased to a maximum capacity of 12-15 megawatts. The application of the MPC, accepted without question

by the agency responsible for the environmental impact study (the DNRC), projects a need at Big Sky of 30 megawatts. This 30 megawatt projection was not substantiated by the MPC application, nor did the environmental impact study make any attempt to justify the load growth projection to 30 megawatts. Yet the MPC application is for a 161 KV line - which has a carrying capacity of 200 megawatts, or almost five times the projected load growth stated in the application.

As stated by Justice Morrison, all but 5 megawatts could, as disclosed in the hearing, be met through application of conservation alternatives which do not require additional electrical services. How, then, can the environmental impact statement be sufficient when it fails to address the need and the existing alternatives to the projected energy demand of Big Sky? It was error, as Justice Morrison points out, for the District Court to hold that the environmental impact statement could be given life by instead looking to the "Board's decision on the entire record," In-cluding the deficient environmental impact statement. Justice Morrison correctly concludes, on the other hand, that the environmental impact statement must stand on its own, and here it cannot stand.

Nor can I understand the total failure of the DNRC to demand from MPC, that it comply with the information required to be in an application for a permit. Here the DNRC admitted that the MPC application was deficient, and that it did nothing to make the application sufficient. Rather, the DNRC proceeded with the environmental impact study without ever obtaining and evaluating either the need for the 161 KV line or the alternatives to supplying power for the projected needs of Big Sky.

The fault in not making an adequate application can be laid directly at the doorsteps of the MPC. But the DNRC should not have started its environmental impact study until it had a complete or substantially complete application. Furthermore, if the study was started without noticing this rather glaring omission, once noticed, it was the duty of the DNRC to notify the MPC to complete its application and to further notify the MPC that the study could not be finished until the application was complete and the DNRC had evaluated the additional information provided in the application. Here that was not done. Rather, the DNRC proceeded with the study without ever compelling the MPC to comply with the clear directives of the Montana Envi-ronmental Protection Act as to alternatives (section 75-1-201(3), MCA) and need (section 75-20-102(1), MCA). The DNRC can hardly be said to have been protecting the constitutional rights of Montana citizens to a clean and healthy environment when it made its impact study without directing the MPC to comply, and without itself complying with these statutes. Nor did the District Court or this Court fulfill its duty by approving an environmental impact statement so glaringly deficient.

CASE:

KADILLAK v. THE ANACONDA CO.
184 Mont. 127.

GEORGE AND MARIE KADILLAK, HUSBAND AND WIFE ET AL., PLAINTIFFS AND APPELLANTS, v. THE ANACONDA COMPANY ET AL., DEFENDANTS AND RESPONDENTS.

No. 14348.
Submitted June 15, 1979.
Decided Oct. 16, 1979.
Rehearing Denied Nov. 26, 1979.
602 P.2d 147.

Appeal from the District Court of Silver Bow County.
Second Judicial District.
Hon. Frank E. Blair, Judge presiding.
See C.J.S., Mines and Minerals, sec. 238.

Department of state lands directed to return operating permit application as incomplete and inadequate, and further use of area for mining operations enjoined until valid permit issued; cause remanded for evidentiary hearing on attorney fees, and all other relief denied.

Mr. Justice Shea concurred specially.

McGarvey, Lence & Heberling, Kalispell, Dale L. McGarvey, argued and Jon L. Heberling, argued, Kalispell, for plaintiffs and appellants.

Mike Greely, Atty. Gen., Helena, D. L. Holland, argued, Anaconda Co., Butte, John F. North, argued, Helena, Jack Holstrom, argued, State Highways, Helena, Stan Bradshaw, argued, Helena, Dept. of Health, for defendants and respondents.

MR. CHIEF JUSTICE HASWELL delivered the opinion of the Court. Plaintiffs appeal from a judgment of the District Court of Silver Bow County denying them relief on their complaint against the Anaconda Company and various state agencies relating to the establishment and operation of waste dump containing overburden and discard from open pit mining operations in the vicinity of their residences.

Early in the spring of 1974, residents of the Hillcrest subdivision in Butte, Montana, learned from newspaper articles that the Anaconda Company was contemplating mining activities in close proximity to their homes. They were naturally concerned about this prospect and contacted Anaconda officials and various state agencies to voice that concern.

On June 6, 1974, Anaconda filed with the Department of State Lands (State Lands) an application for a permit for mining activities in the contested area. The application was in the form of a request for an amendment to a previously held permit, Mining Permit No. 41. State Lands was unsure whether such a procedure was proper, so it requested an Attorney General's Opinion. After an extended delay, the Attorney General rendered an opinion on August 29, 1975, that acreage could not be added to a mining permit by amendment; rather, a new operating permit must be applied for to cover the new area.

On September 25, 1975, Anaconda officials met with State Lands and it was agreed that the pending application for amendment of Permit No. 41 would be considered the basis for an application for a new permit called Permit 41A. Anaconda was to submit a revised map showing the acreage to be included. That map was received on October 22, 1975, at which time Wilbur Criswill, State Lands Hard Rock Bureau Chief, deemed the application complete. Ted Schwinden, at that time Commissioner of State Lands determined that issuance of Permit 41A would be a major action of state government with possible adverse environmental effects requiring an impact statement under the Montana Environmental Policy Act (MEPA). Schwinden assigned the task of writing the 41A environmental impact statement (EIS) to Charles Van Hook, a member of the staff of State Lands Reclamation Division. The 41A EIS was the first EIS Van Hook had ever written. Van Hook began work on the 41A EIS on November 25, 1975. On December 4, he requested in a letter to Anaconda certain additional information on mining and reclamation plans "needed... to construct an accurate impact statement." Anaconda supplied more data in response on December 9, but Van Hook still felt the materials were deficient.

Subsequently, on or about December 15, 1975, Van Hook submitted a memo to his superior at State Lands, C. C. McCall, noting that his study of the application materials and the regulations in regard to issuance of Hard Rock Permit 41A indicated the application did not meet the requirements of the law in numerous respects. McCall then drafted a memo to Commissioner Schwinden detailing numerous specific areas where the application for Permit 41A failed to meet the statutory requirements of the Hard Rock

Mining Act (HRMA).

On December 15, 1975, the same date as the memo from McCall, Schwinden summoned Anaconda representatives to a meeting to discuss the problems concerning the Permit 41A application. Van Hook and McCall explained the areas of concern. That eve-ning, Anaconda official spent several hours working up more data in response to those problems, and on December 16 they submitted a mining plan and some further information. This new data was in-corporated in the EIS which was mailed out on Friday, December 19. None of the State Lands officials had time to check the new material against the regulations and statutes for completeness before the EIS went out. On December 22, 1975, Commissioner Schwinden approved Permit 41A.

On January 5, 1976, an article appeared in the Billings Gazette concerning plans of the Anaconda Company to construct in the 41A Permit area a mountainous waste dump of overburden and discard from open pit mining operations. The dump area approaches within a quarter of a mile of homes in the Hillcrest subdivision. The permit area comes to within 200, feet. On January 15, and 16, 1976, a representative of the Hillcrest residents contacted the State Environmental Quality Control Council (EQC) about possible irregularities in the issuance of Permit 41A. By letter dated January 16, 1976, Steven J. Perimutter, staff attorney for EQC, replied to those inquiries, expressing the opinion that the procedure followed in issuing Permit 41A may indeed have violated sections of the HRMA, MEPA, and the Montana Administrative Procedures Act(MAPA).

The original complaint in this action was filed on March 12, 1976. The complaint was amended on May 26, 1976. The plaintiffs are approximately 125 property owners in the Hillcrest and Continental Drive areas of Butte in close proximity to the waste dump. The complaint is captioned "Complaint for Injunction" and is framed in 14 separate causes of action. The relief sought is revocation of Permit 41A and injunction against Anaconda prohibiting mining activities in the 41A area until writs of mandate directed to State Lands to reconsider the permit in the light of MEPA requirements and the HRMA, to DHES to require pollution permits, and to the Department of Highways to prepare an EIS on the abandonment of U.S. 91, have been performed to the court's satisfaction. No preliminary injunction was sought; work on Anaconda's Hillcrest dump commenced in August or September, 1976, and continues, presumably, to the present. The dump is now a mountain of substantial dimensions.

Trial of this cause commenced in Silver Bow County District Court on August 22, 1977. It encompassed 13 days of testimony and argument. After submission of briefs and consideration of the case, the court filed findings of fact, conclusions of law and a supporting memorandum on March 13, 1978. The findings and conclusions address separately each of the causes of action contained in the complaint. Judgment was subsequently entered for defendants and against plaintiffs on all causes of action, denying any relief.

The issues on appeal are:

1. Was an EIS required before Permit 41A issued and if so, was the EIS which was prepared adequate under MEPA?

2. Was the application for Permit 41A deficient under the Hard Rock Mining Act, and if so, was the granting of the permit by State Lands in violation of a clear legal duty?

3. Were public notice and opportunity for hearing required before Permit 41A was issued by State Lands?

4. Was Permit 41A invalid because a permit under the Clean Air Act was not obtained?

5. Whether the Department of Highways was required to prepare an EIS on the abandonment of U.S. 91 in conjunction with Permit 41A, and whether the failure to do so renders the permit invalid? 6. Is a writ of mandate a proper remedy?

7. Are plaintiffs entitled to attorney fees for enforcement of their constitutional right to know under section 2-3-221, MCA? ENVIRONMENTAL IMPACT STATEMENT:

The first issue is whether an EIS is required before granting a permit under the Hard Rock Mining Act (HRMA). We hold that under the facts of this case an EIS was not required.

[1] The Montana Environmental Policy Act (MEPA) provides, in part:

"The legislature authorizes and directs that, to the fullest extent possible:

"(1) the policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this chapter;

"(2) all agencies of the state shall:

"...

"(c) include in every recommendation or report on proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment, a detailed statement..." Sections 75-1-201, MCA. (Emphasis added.)

The action which allegedly affects this environment is the dumping of overburden and other waste by the defendant Anaconda Company. This can occur only in conformity with a permit granted by the Board of Land Commissioners. Section 82-4-335, MCA. It is well accepted that granting a permit or license to act is a state action which must be accompanied by an EIS if the activity it allows is capable of significantly affecting the human environment. Rodgers, Environmental Law, sec. 7.6, pp. 761-63. [2] We fully

recognize that not every action of state government requires the preparation of an EIS. If the agency properly decides that the action will not "significantly affect the human environment" an EIS is not necessary.

In the instant case a mammoth project was proposed and the Commissioner of State Lands was quite correct in deciding that an EIS must precede the granting of a permit.

[3] At the time application for Permit 41A was filed, the Hard Rock Mining Act required:

"Upon receipt of an application for an operating permit the mining site shall be inspected by the department. Within sixty (60) days of receipt of the complete application and reclamation plan by the board and receipt of the permit fee, the board shall either issue an operating permit to the applicant or return any incomplete or inadequate application to the applicant along with a description of the deficiencies. Failure of the board to so act within that period shall constitute approval of the application and the permit shall be issued promptly thereafter." Section 82-4-337, MCA. (Emphasis added.)

The 60 day period is a woefully inadequate period for the preparation of a proper EIS. As noted by the United States Supreme Court, a draft EIS on simple projects prepared by experienced personnel takes some three to five months to complete. Flint Ridge Development Co. v. Scenic Rivers Assoc. (1976), 426 U.S. 776, 789, 96 S.Ct. 2430, 2438, 49 L.Ed.2d 205, 216. n. 10. This fact was recognized by the legislature when in 1977 the statute was amended to provide:

"If the department determines that additional time is needed to review the application and reclamation plan for a major operation, the department and the applicant shall negotiate to extend the 60-day period by not more than 365 days in order to permit reasonable review." Section 82-4-337(1)(b)(ii), MCA; Sec. 1, Ch. 427, Laws of Montana (1977).

Testimony was presented and the District Court ruled that because the 60 day period could not possibly accommodate the preparation of an IES, [EIS] an EIS was not required. This conclusion was reached on the basis of Flint Ridge Development Co. v. Scenic Rivers Assoc., supra; and Moloney v. Kreps (D.N.J. 1977), 10 ERC 1773.

In Flint Ridge, the Court considered whether an EIS is required when the Secretary of Housing and Urban Development reviews a disclosure statement under the Disclosure Act, which requires land developers to file these statements for the information of potential buyers. The developer may not sell or lease any lot until the disclosure statement is approved by the Secretary. Once the disclosure statement is filed with him, the Secretary has 30 days to approve or disapprove it. If the Secretary fails to act within the 30 day period, the disclosure statement is deemed automatically approved.

The Scenic River Association contended that the National Environment Policy act had the effect of authorizing the Secretary to suspend the 30-day time limit while an EIS is prepared. In rejecting this argument, the United States Supreme Court stated: "The Secretary cannot comply with the statutory duty to allow statements of record to go into effect within 30 days of filing, absent inaccurate or incomplete disclosure, and simultaneously prepare impact statements on proposed developments. In these circumstances, we find that NEPA's impact statement requirement is inapplicable." Flint Ridge, 426 U.S. at 791, 96 S.Ct. at 2440, 49 L.Ed.2d at 218.

The high court noted the legislative intent behind the Act: "The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in [@102(2)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible..." Flint Ridge, 426 U.S. at 787-788, 96 S.Ct. at 2438, 49 L.Ed.2d at 216, citing 115 Cong. Rec. 29703(1969). (Note: section 102(2), NEPA corresponds with section 75-1-201(1)(c), MCA, which imposes the duty of preparing an EIS on state agencies.)

The Court reasoned that: "Section 102 recognizes... that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way." 426 U.S. at 788, 96 S.Ct. at 2438, 49 L.Ed.2d 216. This statement has been cited in numerous cases for the proposition that when a statutory time limit precludes the statutory duty of preparing an EIS, the EIS must yield. The federal courts have concluded that in such situations an EIS is not necessary. See e. g. Moloney, 10 ERC 1773; Concerned about Trident v. Rumsfeld (D.C.Cir.Ct.1977), 180 U.S.App.D.C. 345, 351, 555 F.2d 817, 823.

Under the facts of the instant case this Court holds that an EIS was not required for the same reasons that an EIS was not required in the Flint Ridge case. The language, "to the fullest extent possible" is identical in both the NEPA and MEPA. The trial court found that an adequate EIS would require 5 to 6 months to complete and that an EIS for the Permit 41A project could not have been prepared in 60 days.

[4] Additionally, it is a well settled principle of statutory construction that the specific statute will control the general. State ex rel. Marlenee v. District Court (1979), 181 Mont. 59, 592 P.2d 153, at 156. At the time of the filing of Permit 41A State Lands had a specific 60 day period within which to act. In comparison, the MEPA is prefaced with the language, "to the fullest extent possible." The MEPA is the general statute in these circumstances. HRMA is the specific statute and controls in this case.

We emphasize that Flint Ridge and similar federal cases are uniformly based on the unavoidable and irreconcilable conflict between federal statutes. It was stated in the dissent to Montana Wilderness Ass'n v.

Bd. of Health and Environmental Sciences (1976), 171 Mont. 477, 506, 559 P.2d 1157, 1172, (Haswell J., dissenting):

"Because MEPA is modeled after NEPA, it is appropriate to look to the federal interpretation of NEPA. This Court follows the rule found in Ancient Order of Hibernians v. Sparrow (1903), 29 Mont. 132, 135, 74 P. 197, 198:

"'"...that the construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and ... only strong reasons will warrant a departure from it."'

[5] The appellants contend that a "strong reason" to depart from the federal interpretation are the following sections in the 1972 Montana Constitution:

"All people are born free and have certain inalienable rights. They include the right to a clean and healthful environment.

1972 Mont.Const., Art. II, sec. 3.

"...

"(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

"(2) The legislature shall provide for the administration and enforcement of this duty.

"(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." 1972 Mont.Const., Art. IX, sec. 1.

This argument, however, does not have sufficient merit to compel this Court to abandon the rationale of Flint Ridge. Both the MEPA and the HRMA predate the new constitution. There is no indication that the MEPA was enacted to implement the new con-stitutional guarantee of a "clean and healthful environment." This Court finds that the statutory requirement of an EIS is not given constitutional status by the subsequent enactment of this constitutional guarantee. If the legislature had intended to give an EIS constitutional status they could have done so after 1972. It is not the function of this Court to insert into a statute "what has been omitted." Security Bank v. Connors (1976), 170 Mont. 59, 67, 550 P.2d 1313, 1317. The ordinary rules of statutory construction apply. An EIS was not a requirement at the time Permit 41A was granted.

HARDROCK MINING ACT

The HRMA, section 82-4-301 et seq., MCA, provides in part that "no person shall engage in mining in the state without first obtaining an operating permit from the board to do so." Section 82-4-335, MCA. State Lands is given the responsibility of administering the HRMA. Section 82-4-321, MCA. The application for a permit under this Act must contain several specific items of information including a proposed reclamation plan, and a plan of mining. Section 82-4-335, MCA.

[6] Among other claims of error in issuing the permit, plaintiffs argue that there was no mining plan for 410 acres of the 500 acres included in Permit 41A. A review of the two-page mining plan indicates that this is true. The application requested a permit covering 500 acres, yet the mining plan only refers to 90 acres. Nothing is said about the plans for the other 410 acres. Defendant State Lands argues that this deficiency can be cured later by requiring Anaconda to submit a mining plan for the additional acres. It must be noted that the mining plan must be submitted before the permit is issued. To allow the issuance of a permit for the entire 500 acres when there is a mining plan for only 90 acres violates the express requirements of HRMA.

Although the deficiency of the mining plan is sufficient grounds for voiding the permit, three other independent grounds exist for invalidating it:

[7] 1. A reclamation plan must be included in every application for a permit under the HRMA. Section 82-4-335(3), MCA Rule 5A3, A.R.M. 26-2. 10(2)-S10030, requires that pertinent climatic conditions be described in the reclamation plan. In the Permit 41A application Anaconda devotes one sentence to climatic conditions. This one sentence merely gives the annual rainfall in the Butte area. There is no mention of temperature, wind patterns or any other pertinent climatological, data which would give the agency an opportunity to correctly evaluate the proposed uses of the reclaimed land. This one sentence description is inadequate as a matter of law. For State Lands to approve this description in light of the purposes for which this data must be used is an abuse of discretion.

[8] 2. Section 82-4-303(10)(a) requires that the reclamation plan include a "proposed subsequent use of the land after reclamation." This is omitted from the Permit 41A reclamation plan. There is a statement on page 1 of the plan that "upon termination of mining and associated disturbances the Company will consider offering the land for other uses."

This Court notes that a statement as to the subsequent use of the disturbed land is central to any meaningful decision concerning the adequacy of the reclamation plan. State Lands could not possibly make an informed or adequate evaluation of the reclamation plan unless they were given a sufficient statement as to what the reclamation plan is supposed to accomplish. To allow the statement, "The Company will consider offering the land' for other uses" as an adequate statement of subsequent use would be to make a

mockery of the HRMA. Such statement is inadequate as a matter of law.

[9] 3. Section 82-4-335(5), MCA, requires that a map be submitted showing the area which will be disturbed by the proposed mining activity. In this case a map covering only 90 acres was submitted and a permit for 500 acres was granted. This is a clear violation of the HRMA.

For these reasons the permit was invalid. The present mining operations on the 500 acres covered by Permit 41A cannot be continued until an adequate application is made and a valid permit pursuant to the HRMA is issued.

NOTICE AND HEARING

[10] Plaintiff homeowners basically contend that Permit 41A was invalid because State Lands did not give notice and offer an opportunity for a hearing before the permit was issued. They claim that they were denied their right to notice and participation which is granted by section 2-3-103(1), MCA. At the time this action commenced the predecessor to this section (section 82-4228, R.C.M. 1947) did grant the public the right to have notice and to participate in agency actions such as granting a permit. It must be noted, though, that section 2-3-114 requires that action must be taken in District Court within 30 days of the date of decision. In the instant case, the permit was granted on December 22, 1975, and the original complaint was filed on March 12, 1976. Thus, the District Court lacked jurisdiction to consider plaintiffs' rights under this section.

[11] Plaintiffs next contend that they were entitled to a hearing under the MAPA. The applicable section reads:

"[i]n a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice." Section 2-4-601, MCA.

"Contested case" is defined in the MAPA as follows:

"'Contested case' means any proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to rate making, price fixing, and licensing." Section 2-4-102(4), MCA.

Under the HRMA, as it existed at the time that these events transpired, no opportunity for a hearing was required before the permit was issued. Consequently, this was not a contested case under the HRMA, or under the MAPA. In fact if this had been a "contested case" under the MAPA the District Court would have been without jurisdiction to consider this case in the first instance. Section 2-4-702(2)(a), MCA, provides that "Proceedings for review [of contested cases] shall be instituted by filing a petition in district court within 30 days after service of the final decision..."

[12] Plaintiffs also contend that Article II, Section 8, 1972 Mont. Const., provides authority for the proposition that they were entitled to an opportunity to participate in the decision to grant Permit 41A. This section says:

"Right of Participation. The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." (Emphasis added.) Under this section the public's right to participate is limited to those instances where that right is "provided by law." The HRMA, as noted above, does not provide for public participation in the decision making activity which precedes the issuing of a permit. In the instant case, this constitutional provision does not support plaintiffs' contention.

CLEAN AIR ACT

[13] The next issue raised by the plaintiffs is the failure of the Department of Health and Environmental Sciences (DHES) to control air pollution from the 41A dump area. Plaintiffs contend that DHES has violated a clear legal duty controllable by a writ of mandate.

Mandamus lies only to compel performance of a ministerial duty and never to compel the performance of a duty or power that requires the exercise of discretion. State ex rel. Wiedman v. City of Kalispell (1969), 154 Mont. 31, 34 459, P.2d 694,696. The relevant statute is section 75-2-204, MCA, which provides:

"The board may by rule prohibit the construction, installation, alteration, or use of a machine, equipment, device, or facility which it finds may directly or indirectly cause or contribute to air pollution or which is intended primarily to prevent or control the emission of air pollutants, unless a permit therefore has been obtained."

The language of this statute is couched in terms which clearly indicate a discretionary function. The statute begins, "The board may..." This clearly indicates that the legislature was giving the DHES a discretionary duty in this respect. Since the duty was discretionary rather than ministerial, a writ of mandate cannot be issued against DHES.

THE DEPARTMENT OF HIGHWAYS

Plaintiffs contend that an EIS is required on the abandonment of U.S. Highway 91. This issue arose because the Permit 41A area is bisected by old U.S. 91. The highway itself is not included in the requested permit area, but is bordered by the permit area on each side. At the time Permit 41A was applied for, Anaconda had in process a petition to abandon U.S. 91. The evidence presented at the trial of this matter indicates that the State Highway Commission had not yet made a decision whether to

abandon the highway. No evidence of the abandonment was before the trial court.

[14] On February 1, 1978, the Highway Commission entered an order of abandonment on the 3.2 miles of U.S. 91 that passes through the Permit 41A area, upon payment by Anaconda of $1.8 million. This occurred after judgment on this matter had been entered by the District Court.

At the time this case went to trial, no final decision had been made by the Highway Commission concerning the abandonment of U.S. 91. Courts will not ordinarily administer judicial remedies while the matter is pending in administrative proceedings. This deference on the part of courts "is generally applied when the Court believes that considerations of policy recommend that the issue be left to the administrative agency for initial determination." Grever v. Idaho Telephone Co. (1972), 94 Idaho 900, 499 P.2d 1256, 1258.

Here the District Court was correct in ruling this issue to have been prematurely submitted for review. It is sound policy that courts will not interfere with an agency proceeding until there is final action by that agency on a particular matter.

MANDAMUS

[15] Since this opinion affirms the judgment as to DHES and the Highway Department, mandamus will be discussed only as it applies to State Lands.

The statutory law concerning the writ of mandate in Montana is contained at sections 27-26-101 et seq., MCA. Section 27-26-102(1) provides in pertinent part that this writ "... may be issued by the supreme court... to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station..."

As stated by this Court in State ex rel. Sware v. Casne (1977), 172 Mont. 302, 309, 564 P.2d 983, 987:

"The writ will issue only where the person seeking to invoke it is entitled to have the defendant perform a clear legal duty and there is no speedy or adequate remedy in the ordinary course of law."

In the instant case we hold that State Lands had a clear legal duty to require that Anaconda submit the required application before Permit 41A was issued. Section 82-4-337(1)(a), MCA, states the duty which is imposed upon State Lands when faced with a deficient application. This statute states in part:

"... the board shall either issue an operating permit to the applicant or return any incomplete or inadequate application, along with a description of the deficiencies..." (Emphasis added.)

State Lands' duty when faced with a deficient application (such as Anaconda's in this case) becomes readily apparent from a reading of the statute. State Lands "shall... return any incomplete or inadequate application." (Emphasis added.) If the application is complete and adequate then State Lands "shall ... issue an operating permit." Anaconda's application was obviously incomplete and inadequate. For State Lands to issue a permit for 500 acres when the mining plan only covers 90 acres constitutes a clear abuse of discretion and is a failure to perform a clear legal duty. State Lands had a clear legal duty to return the application as incomplete and inadequate.

State Lands contends that mandamus cannot lie to correct or undo an act already performed. Melton v. Oleson (1974), 165 Mont. 424, 432, 530, P.2d 466, 470. This is a correct statement of the law. What this Court is mandating, however, is not the undoing of an act. Rather, we are directing State Land to perform an act which they have not done and which they had a clear legal duty to do. They are to return the Permit 41A application to Anaconda as inadequate and incomplete. Because the application was not returned Permit 41A was void from the beginning and Anaconda may not continue the mining activities on the Permit 41A area until a valid permit is granted by State Lands.

ATTORNEY FEES UNDER SECTION 2-3-221, MCA.

[16] This issue need not be discussed, because attorney fees are available to plaintiffs under the mandamus statutes, section 27-26-402, MCA.

In summary, we mandate that State Lands is to return the application for Permit 41A as incomplete and inadequate. We enjoin further use of the 41A area for mining operations until a valid permit is issued by State Lands. The cause is remanded to the District Court for an evidentiary hearing on attorney fees which are granted to the prevailing party on a writ of mandate. All other relief is denied.

MR. JUSTICES DALY and HARRISON and JOEL G. ROTH, District Judge, sitting in place of Mr. Justice Sheehy, concur.

MR. JUSTICE SHEA specially concurs and will file an opinion later.

BRIEF: (Do not cite!!!)

insert text

insert text

Case:

MONT. WILDERNESS ASSN. v. BOARD OF HEALTH
171 Mont. 477.

THE MONTANA WILDERNESS ASSOCIATION, AND GALLATIN SPORTMEN'S ASSOCIATION, INC., PLAINTIFFS AND RESPONDENTS, v. THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA AND THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA, DEFENDANTS AND APPELLANTS; AND BEAVER CREEK SOUTH, INC., A CORPORATION, INTERVENOR AND APPELLANT.

No. 13179.
Submitted Dec. 6, 1976.
Decided Dec. 30, 1976.
559 P.2d 1157.

Appeal from the District Court of Lewis and Clark County.
First Judicial District.
Hon. Gordon R. Bennett, Judge presiding.
See C.J.S., Municipal Corporations, Sec. 83.

Reversed, complaint dismissed.
Haswell, J., filed a dissenting opinion.
Daly, J., filed a dissenting opinion.
G. Steven Brown argued, Helena, for defendants and appellants.
Dzivi, Conklin, Johnson & Nybo, William P. Conklin argued, Great Falls, for intervenor and appellant.
James H. Goetz argued, Bozeman, for plaintiffs and respondents.
Steven J. Perlmutter argued, Richard M. Weddle, Helena, Donald R. Marble, Chester, Anderson, Symmes, Forbes, Peete & Brown, Billings, for amicus curiae.

MR. JUSTICE CASTLES delivered the opinion of the Court.

This is an action by the Montana Wilderness Association and the Gallatin Sportsmen's Association, Inc., for declaratory and injunctive relief against a proposed subdivision development in Gallatin County known as Beaver Creek South. The district court of Lewis and Clark County entered summary judgment (1) that the environmental impact statement on the proposed subdivision was void, (2) ordering reinstatement of the prior sanitary restrictions on the proposed subdivision, and (3) enjoining further development of the proposed subdivision until the reimposed sanitary restrictions are legally removed. One of the defendants and intervenor, appeal.

The instant appeal is on rehearing and the opinion previously promulgated on July 22, 1976, is withdrawn. Plaintiffs in the district court were the Montana Wilderness Association, a Montana nonprofit corporation dedicated to the promotion of wilderness areas and aiding environmental causes generally, and Gallatin Sportmen's Association, Inc., a Montana nonprofit corporation organized for charitable, educational and scientific purposes including the conservation of wildlife, wildlife habitat and other natural resources.

Defendants are (1) the Board of Health and Environmental Sciences and, (2) the Department of Health and Environmental Sciences of the State of Montana. Intervenor Beaver Creek South, Inc. is a Montana corporation and the developer of the proposed subdivision and has been made a party to the judgment. The Montana Environmental Quality Council, a statutory state agency, appeared in the district court as amicus curiae. The Montana Department of Community Affairs appears as amicus curiae. Other amicus curiae appeared by brief.

Beaver Creek South owns a tract of approximately 160 acres adjacent to U.S. Highway 191 in the Gallatin Valley seven miles south of Big Sky of Montana. Early in 1973 Beaver Creek submitted to the Bozeman City-County Planning Board a subdivision plat for approval by that board and the Gallatin County Commissioners, contemplating development of 95 acres of that tract as a planned unit development in two phases. This submission and approval was required by sections 11-3859 through 11-3876, R.C.M. 1947, known as the Montana Subdivision and Platting Act. After publication of notice a public hearing was held on October 11,

1973 where the only public reaction was from the State Department of Fish and Game, expressing concern about possible infringement of wildlife habitat along the highway.
Again, on January 10, 1974, a second public hearing was held after notice concerning a second phase of the development was given. At this second hearing, no public comments were received. Approval of the subdivision was recommended and carried out, subject to approval of water and sewer systems by the Montana Department of Health and Environmental Sciences as required by sections 69-4801 through 69-4827, R.C.M. 1947. The application for this approval had been made by the owner early in 1973 also. At the local level, neither plaintiff appeared at the public hearings. After several months of conferences and tests the Department issued a draft environmental impact statement on April 8, 1974.
The draft statement was issued purportedly because of the requirements of section 69-6504(b)(3), R.C.M. 1947, the Montana Environmental Policy Act (MEPA). A final impact statement was issued on June 26, 1974.

On July 26, 1974, the Department issued and delivered to Beaver Creek its certificate removing the sanitary restrictions on the plat. On that same day, July 26, 1974, after the issuance of the certificate, the Department was served with an order to show cause and a temporary restraining order issued on the basis of this action filed by plaintiffs on July 25, 1974.

Even though it had already lifted the sanitary restrictions before service of the temporary restraining order, the Department chose on July 29, 1974 to rescind and invalidate its earlier certificate. Following this a series of procedural matters were had and the Department undertook to revise its Environmental Impact statement. At this point, the landowner, Beaver Creek, was not a party to the proceedings. It was allowed to intervene in September, 1974. The Gallatin County Board of County Commissioners was never a party to the action.

Motions to dismiss and briefs were filed, and on February 11, 1975, the district court ordered the temporary restraining order be dissolved, and the Associations be given an opportunity to file an amended complaint seeking a declaratory judgment on any impact statement other than the one filed in June 1974. In its memorandum and order, the district court found the Associations had standing to sue a state agency, but the Department must be given an opportunity to exercise its discretion and that an injunction would lie "only after the Department has acted unlawfully".

On February 14, 1975 the Department again conditionally removed the sanitary restrictions on Beaver Creek South. On February 21, 1975, plaintiffs filed their second amended complaint seeking: (1) declaratory judgment that the Revised EIS
of the Department was inadequate in law; (2) a permanent injunction prohibiting Beaver Creek from selling any of the lots of further developing Beaver Creek South until compliance with the laws of Montana was effected; and (3) a mandatory injunction ordering the Department to reimpose sanitary restrictions on Beaver Creek South.

The focus of the second amended complaint is that the Revised EIS does not comply with legal requirements of MEPA in these particulars:

(1) The Revised EIS does not disclose that the Department used to the fullest extent possible a systematic,
interdisciplinary approach as required by section 69-6504(b)(1), R.C.M. 1947.

(2) The Revised EIS does not include a detailed statement of alternatives to the proposed action nor were such alternatives studied, developed or described to the fullest extent possible as
required by section 69-6504(b)(3)(iii) and 69-6504(b)(4), R.C.M. 1947.

(3) The Revised EIS does not contain a detailed statement of the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity as required by section 69-6504(b)(3)(iv), R.C.M. 1947.

(4) The Revised EIS does not include to the fullest extent possible a detailed statement of the environmental impact of the proposed subdivision as required by section 69-6504(b)(3)(i), R.C.M. 1947.

(5) The Revised EIS contains no adequate consideration of the full range of the economic and environmental costs and benefits of the alternative actions available.

Defendants and intervenor filed motions to dismiss the second amended complaint. This complaint was further amended; the Environmental Quality Council was granted leave to file a brief as amicus curiae; briefs were filed by all parties; and the matter was submitted to the district court for decision.

The district court considered the motions to dismiss as motions for summary judgment under Rule 12(b)(6), M.R.Civ.P. and considered matters outside the pleadings, principally interrogatories and answers.

On August 29, 1975, the district court issued its opinion and declaratory judgment. In substance the district court held the plaintiffs have standing to prosecute this action, that the Revised EIS does not meet statutory requirements in various particulars, and plaintiffs are entitled to injunctive relief. Judgment was entered accordingly.

Defendant Department of Health and Environmental Sciences and intervenor Beaver Creek South, Inc. appeal from the judgment.

The single determinative issue here is the function of the Department in land use decisions such as is involved in this case; that is, a simple subdivision plat. Other ancillary issues as to "standing" of the plaintiff

associations to sue and the right to injunctive relief have been briefed and argued but need not be determined here because of our view of the law of Montana. It is seen that the district court findings and judgment are premised on
the MEPA being the ruling statute; and that the Department of Health is required to file an impact statement; and, further, that the Department has the final land use decision over and above the water supply, sewage and solid waste disposal issues. Although the district court did not specifically discuss this problem, it can be the only basis for its decision.

In analyzing the law of Montana, three acts of the Montana legislature are involved. The three acts which must be looked to and harmonized are:

(1) The 1967 Subdivision Sanitation Act, sections 69-5001 through 5009, R.C.M. 1947.

This Act prohibits the recording of any subdivision plat until the Department issues its certificate removing sanitary restrictions from the plat. It is primarily a public health measure and is designed to protect the quality and potability of public water supplies.

(2) The 1971 Montana Environmental Policy Act, sections 69-6501 through 6518, R.C.M. 1947. This Act declares as its purpose in section 69-6502:

"The purpose of this act is to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the state; and to establish an environmental quality council."

The MEPA then goes on to describe in general terms the environmental impacts that must be assessed when agencies of the state make major decisions having a significant impact on the human environment. Section 69-6504 requires state agencies to prepare detailed statements analyzing the impacts of major actions of state government in several categories. In that same section the "responsible state official" shall consult with other state agencies, and, in subdivision (6) provides that state agencies shall: "make available to counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment".

The MEPA also created a legislative branch entity known as the Environmental Quality Council. This group has been vested with legislative watchdog authority as a sort of legislative auditor within the legislative branch of government. This Act was amended in 1975 so that all voting members of the council are legislative members. The original Act was passed prior to the effective date of the 1972 Montana Constitution.

(3) The 1973 Subdivision and Platting Act, sections 11-3859 through 11-3876, R.C.M. 1947. This Act confers upon local governing bodies the authority to approve or disapprove a subdivision based on a variety of environmental, economic and social factors (section 11-3863). That section, 11-3863, describes the content of the regulations that must be adopted by every local governing body to insure the "* * * orderly development of their jurisdictional areas * * *." The factors that must be considered include the impact on roads, the need for additional roadways and utility easements, adequate open spaces, water, drainage, sanitation facilities and others, including environmental factors. Also in that section it is provided that the state department of intergovernmental relations shall prescribe reasonable minimum requirements for the local governmental units' regulations which shall include "detailed criteria for the content of the environmental assessment required by the act." Public hearings are required and the local governing body "shall consider all relevant evidence relating to the public health, safety and welfare, including the environmental assessment * * *."

It is also noted that section 69-5001 of the 1967 Subdivision Sanitation Act (also amended in 1973) limited expressly the involvement of the Department to "water supply, sewage disposal, and solid waste disposal".

[1] Further analysis of the 1973 Subdivision and Platting Act will demonstrate unequivocally a legislative intent to place
control of subdivision development in local governmental units in accordance with a comprehensive set of social, economic, and environmental criteria and in compliance with detailed procedural requirements.

[2] Significantly, no similar mandate is given in the 1971 MEPA. Thus we conclude that the district court's reasoning,
necessarily implied from its holding, that MEPA extends the Department's control over subdivisions beyond matters of water supply, sewage and solid waste disposal is in error as it is in direct conflict with the legislature's undeniable policy of local control as expressed in the Subdivision and Platting Act. A further comparison of the local control versus State
control over subdivisions is this -- the 1973 legislature charged local governing bodies with comprehensive control over subdivision development. and amended that law in 1974 and 1975. If the 1971 MEPA already lodged this control in the state Department, such legislation was superfluous. Also, the express purpose of MEPA set

out previously herein states to "encourage", "promote" and "enrich" [understanding]. Nowhere in the MEPA is found any
regulatory language.

[3,4] We refer back to the procedures here. The local governing unit, the Gallatin County Commission, had already complied with the laws. It was not made a party to this action. It had a statutory duty and right to act. The MEPA does not change the law with regard to that. Accordingly the judgment directed to the Department's failure to adequately write an environmental impact statement has nothing to do with the authority of the county commission to act. As to the Department, it of course, can supplement information available to local governing bodies, but its only regulatory function is in the statutorily prescribed areas of water supply, sewage and solid waste disposal.

We have not herein set out the function of the Montana Department of Community Affairs which has submitted a brief amicus curiae. But we do observe that detailed procedures for intergovernmental functions are set out by statutes, regulations, and procedures for protection of the environment.

Finding, as we have, that the regulatory function of subdivisions is local, the judgment and injunctive order of the
district court is reversed and the complaint ordered dismissed.

MR. JUSTICE JOHN C. HARRISON and A. B. MARTIN, District
Judge, sitting for Chief Justice James T. Harrison, concur.

MR. JUSTICE HASWELL dissenting:

The decision of the Court today deals a mortal blow to environmental protection in Montana. With one broad sweep of the pen, the majority has reduced constitutional and statutory protections to a heap of rubble, ignited by the false issue of
local control.

This case does not concern local approval of subdivision plats by county commissioners under the Subdivision & Platting
Act. Neither the county commissioners nor the city-county planning board is a party to this litigation. Nobody claims that the county commissioners do not have the power of approval of subdivision plats in conformity with the Subdivision & Platting Act. State v. local control is simply a "red herring" in this case.

The real issues in this case concern the right of two essentially local environmental organizations whose members make
substantial use of nearby public lands for recreational purposes to compel a state agency to conform to the requirements of the Montana Environmental Policy Act regarding an Environmental Impact Statement to the end that an adequate environmental assessment will be made and considered by the decision makers, be they local or state or whoever they may be. If they cannot, the inalienable right of all persons to a clean and healthful environment guaranteed by Montana's Constitution confers a right without a remedy; the requirements of Montana's Environmental Policy Act and
related environmental legislation become meaningless and illusory; and the mandatory Environmental Impact Statement deteriorates into a meaningless gibberish, providing protection to no one. These issues are embodied in the three principal issues raised by the parties, viz. standing, the validity of the Environmental Impact Statement, and injunctive relief.

In my view, the majority neatly sidesteps these real issues in this case. Instead, the majority decision effectively nullifies
express state policy on environmental matters contained in the Montana Environmental Policy Act, House Joint Resolution 73 approved March 16, 1974, and substantially interferes with and limits the effective operation of the legislature's Environmental Quality Council.

Because this Court has made a 180° turn from its original position, I set out the original decision of this Court for comparison. I believe the original decision is correct, legally sound, and effectuates the purposes and objective of Montana's Constitution and its statutes relating to the environment.

* * * * * *

This is an action by the Montana Wilderness Association and the Gallatin Sportsmen's Association, Inc., for declaratory and injunctive relief against a proposed subdivision development in Gallatin County known as Beaver Creek South. The district court of Lewis and Clark County entered summary judgment (1) that the environmental impact statement on the proposed subdivision was void, (2) ordering reinstatement of the prior sanitary restrictions on the proposed subdivision, and (3) enjoining further development of the proposed subdivision until the reimposed sanitary restrictions are legally removed. One of the defendants and intervenor appeal.

Plaintiffs in the district court were the Montana Wilderness Association, a Montana nonprofit corporation dedicated to the promotion of wilderness areas and aiding environmental causes generally, and Gallatin Sportsmen's Association, Inc., a Montana nonprofit corporation organized for charitable, educational and scientific purposes including the conservation of wildlife, wildlife habitat and other natural resources.

Defendants are (1) the Board of Health and Environmental Sciences and, (2) the Department of Health and

Environmental Sciences of the State of Montana. Intervenor Beaver Creek South, Inc. is a Montana corporation and the developer of the proposed subdivision. The Montana Environmental Quality Council, a statutory state agency, appeared in the district court as amicus curiae.

Beaver Creek South is located in the canyon of the West Gallatin River adjacent to U.S. Highway 191 about seven miles
south of Meadow Village of Big Sky of Montana. Beaver Creek crosses a portion of the property for about one-quarter mile along the north side. The general area where the proposed subdivision is located is a scenic mountain canyon area presently utilized as a wildlife habitat and a grazing area for livestock. Beaver Creek supports a salmonoid fishery. A two lane public highway, U.S. 191, runs through the canyon.

The developer Beaver Creek South, Inc., hereinafter called Beaver Creek, intends to subdivide approximately 95 acres into 75 lots for single-family and multi-family residences and a maximum of seven and one-half acres abutting U.S. Highway 191, for a neighborhood commercial area. The development of the subdivision is to be accomplished in two phases.

In 1973 Beaver Creek submitted to the Bozeman City-County Planning Board its subdivision plat contemplating Beaver Creek South for approval by the board and the county commissioners as required by sections 11-3859 through 11-3876, R.C.M. 1947, the Montana Subdivision and Platting Act. In the spring of 1974 Beaver Creek filed the subdivision plat and plans and specifications for a water supply and sewer system with the Montana Department of Health and Environmental Sciences (hereinafter called the Department) for review and approval as required by sections 69-5001 through 69-5009, R.C.M. 1947, the Sanitation in Subdivisions Act. Section 69-5003(2)(b) provides that a subdivision plat may not be filed with the county clerk and recorder until the Department has certified "that it has approved the plat and plans and specifications and that the subdivision is subject to no sanitary restriction".

In April 1974 the Department circulated a "draft" environmental impact statement on the proposed subdivision in
order to obtain comments on the proposal pursuant to section 69-6504 (b)(3), R.C.M. 1947, of the Montana Environmental Policy Act (MEPA). Written comments were received and the Department issued its "final" environmental impact statement in June 1974. The following month plaintiff Associations commenced this action seeking a permanent injunction against the Department's removal of sanitary restrictions on the proposed Beaver Creek South. The Associations alleged failure of compliance with subdivision laws, administrative rules, Environmental Quality Council guidelines,
and MEPA. The district court issued a temporary restraining order and an order to show cause. The Department and the Associations entered into a stipulation vacating the show cause hearing and the Department revised its final environmental impact statement, submitting a copy to the district court in October 1974. This revised final environmental impact statement is hereinafter called the revised EIS.

Meanwhile, in September 1974, Beaver Creek was granted leave to intervene. Motions to dismiss and briefs were filed, and on February 11, 1975, the district court ordered the temporary restraining order be dissolved, and the Associations be given an opportunity to file an amended complaint seeking a declaratory judgment on any impact statement other than the one filed in June 1974. In its memorandum and order, the district court found the Associations had standing to sue a state agency, but the Department must be given an opportunity to exercise its discretion and that an injunction would lie "only after the Department has acted unlawfully".

On February 14, 1975 the Department conditionally removed the sanitary restrictions on Beaver Creek South.

On February 21, 1975, plaintiffs filed their second amended complaint seeking: (1) declaratory judgment that the Revised EIS of the Department was inadequate in law; (2) a permanent injunction prohibiting Beaver Creek from selling any of the lots or further developing Beaver Creek South until compliance with the laws of Montana was effected; and (3) a mandatory injunc-tion ordering the Department to reimpose sanitary restrictions on Beaver Creek South.

The focus of the second amended complaint is that the Revised EIS does not comply with legal requirements of MEPA in these particulars:

(1) The Revised EIS does not disclose that the Department used to the fullest extent possible a systematic, interdisciplinary approach as required by section 69-6504(b)(1), R.C.M. 1947.

(2) The Revised EIS does not include a detailed statement of alternatives to the proposed action nor were such alternatives studied, developed or described to the fullest extent possible as required by section 69-6504(b)(3)(iii) and 69-6504(b)(4), R.C.M. 1947.

(3) The Revised EIS does not contain a detailed statement of the relationship between local short-term uses of man's
environment and the maintenance and enhancement of long-term productivity as required by section 69-6504(b)(3)(iv), R.C.M. 1947.

(4) The Revised EIS does not include to the fullest extent possible a detailed statement of the environmental impact of the proposed subdivision as required by section 69-6504(b)(3)(i), R.C.M. 1947.

(5) The Revised EIS contains no adequate consideration of the full range of the economic and environmental

costs and benefits of the alternative actions available.

Defendants and Intervenor filed motions to dismiss the second amended complaint. This complaint was further amended; the Environmental Quality Council was granted leave to file a brief as amicus curiae; briefs were filed by all parties; and the matter was submitted to the district court for decision.

The district court considered the motions to dismiss as motions for summary judgment under Rule 12(b)(6), M.R.Civ.P. and considered matters outside the pleadings, principally interrogatories and answers.

On August 29, 1975 the district court issued its opinion and declaratory judgment. In substance the district court held the plaintiffs have standing to prosecute this action, that the Revised EIS does not meet statutory requirements in various
particulars, and plaintiffs are entitled to injunctive relief. Judgment was entered accordingly.

Defendant Department of Health and Environmental Sciences and intervenor Beaver Creek South, Inc. appeal from the judgment.

The issues can be summarized in this fashion:

1) Do plaintiff Associations have standing to maintain this action?

2) Does the Revised EIS satisfy the procedural requirements of the Montana Environmental Policy Act (MEPA)?

3) Are plaintiff Associations entitled to injunctive relief?

Appellants challenge the standing of the Associations to bring this suit. Appellants' arguments fall into three main
categories: a) that the Associations have suffered no cognizable injury; b) that any injury suffered or threatened is
indistinguishable from the injury to the public generally; and c) that neither MEPA, the Montana Administrative Procedure Act, nor any other statute grants standing to these Associations to sue agencies of the state.

Initially, the question of environmental standing under MEPA is one of first impression in Montana. Therefore, the Associations and amicus curiae have presented this Court with numerous authorities from other jurisdictions on the issue of environmental standing. We find none are controlling as to the question before us, but a brief review of such authorities aids in the illumination of the determinative factors regarding this issue.

The Associations urge this Court to adopt the rationale of the federal courts in finding environmental standing because the relevant portions of MEPA in issue here are patterned virtually verbatim after corresponding portions of the National
Environmental Policy Act of 1969, 42 U.S.C. Secs. 4321 through 4347, (NEPA).

In the federal courts, citizen challenges to alleged illegal agency action are often brought pursuant to the federal
Administrative Procedure Act, 5 U.S.C. Sec. Sec. 701 through 706. The companion cases of Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184, 188; and Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970), established the federal two-pronged test for standing to sue administrative agencies. The United States Supreme Court held that persons have standing to obtain judicial review of federal agency action under the Federal Administrative Procedure Act where they allege that the challenged action causes them injury in fact and where the alleged injury is to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies are claimed to have violated.

Data Processing and Barlow did not concern environmental matters, but such a case was presented in Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636, 641 (1972). In Sierra Club, a conservation organization alleged its "special interest" in conservation and sound management of public lands, and sued the Secretary of the Interior for declaratory and injunctive relief against the granting of approval or issuance of permits for commercial exploitation of a national game refuge area in California. Petitioner invoked the judicial review provisions of the federal Administrative Procedure Act. The Supreme Court commenced its discussion of standing with this statement:

> "* * * Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, 678, as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' Flast v. Cohen, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947, 962. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of

the plaintiff."

The Supreme Court held that petitioner lacked standing solely because it did not sufficiently allege "injury in fact" to its "individualized interests", that is, its individual members. Thus the Court did not reach the question of whether petitioner satisfied the "zone of interest" test.

In United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254, 269 (1973), proceedings were brought against the Interstate Commerce Commission (ICC) to enjoin the enforcement of certain administrative orders. Plaintiff organization alleged injury in that each of its members used the natural resources in the area of their legal residences for camping, hiking, fishing, sightseeing, and other recreational and aesthetic purposes. The alleged illegal activity was that the ICC failed to include with its orders a detailed environmental impact statement as required by NEPA. The Court found the allegations of the complaint with respect to standing were sufficient to withstand a motion to dismiss in the district court. The Court also reiterated from Sierra Club that "injury in fact" is not confined to economic harm:

> "* * * Rather, we explained [in Sierra Club]: 'Aesthetic and environmental well-being, like economic well-being, are important ingredients in the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.' * * Consequently, neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing."

It was undisputed that the "environmental interests" asserted by plaintiff were within the "zone of interests" to be protected or regulated by NEPA, the statute claimed to have been violated.

Sierra Club and SCRAP underscore the fact that in the federal courts environmental standing has developed in the statutory context of the federal Administrative Procedure Act.

The lower federal courts have, of course, followed the "injury in fact" and "zone of interest" test. For example, in the Ninth Circuit Court: National Forest Preservation Group v. Butz, 485 F.2d 408(9 Cir., 1973); Cady v. Morton, 8 ERC 1097, 527 F.2d 786 (9 Cir., 1975); City of Davis v. Coleman, 521 F.2d 661 (9 Cir.; 1975).

Here, the Associations also cite several cases from California and Washington in support of their standing argument. The experience in the state of Washington has some pertinence to our inquiry. Washington's State Environmental Policy Act, Washington Revised Code, Ch. 43.2 1C (1974) (SEPA), is also modeled after NEPA and has been interpreted by the Washington courts in several cases. The leading case as to standing is Leschi Improvement Council v. Washington State Highway Commission, 84 Wash.2d 271, 525 P.2d 774, 786 (1974). Washington's SEPA, like MEPA, contains no express provision for judicial review at the behest of private parties. In Leschi petitioners obtained review of a state highway commission's limited access and design hearings and of the commission's environmental impact statement, not pursuant to any statutory grant of standing, but by way of certiorari in the state's lower court. Petitioners also sought an injunction. The Washington Supreme Court held the petitioners had standing because they raised the question of whether a nonjudicial administrative agency committed an illegal act violative of fundamental rights. An illegal act was said to be one which is contrary to statutory authority. More important, the court held that petitioners sufficiently alleged violation of a fundamental right because of the language in SEPA that each person has a "fundamental and inalienable right to a healthful environment." Washington Revised Code Sec. 43.21 C.020(3). This section schematically corresponds to MEPA section 69-6503(b), which recognizes that "each person shall be entitled to a healthful environment * * *."

In Leschi four justices dissented. They objected to the standing of petitioners because:

> "* * * Judicial review of the administrative proceeding involved, at the instance of persons standing in the position of the appellants, is not authorized by any statute or any doctrine of common law, and there is no suggestion that it is mandated by any provision of the state or federal constitutions." (Emphasis supplied.)

Here, appellants suggest this Court follow certain Montana cases in denying standing on the ground that the Associations lack standing to enjoin public officers from acting. This argument fails to distinguish between the separate questions of standing and of injunctive relief. The particular issue of injunctions will be treated separately hereinafter.

In Montana, the question of standing to sue government agencies has arisen in the context of taxpayer and elector suits. State ex rel. Mitchell v. District Court, 128 Mont. 325, 339, 275 P.2d 642, 649, involved a complaint seeking to enjoin the secretary of state from certifying nominees for election to a certain office. This Court said:

"The complaint which the plaintiff * * * filed in the district court shows that his only interest is as a taxpaying, private citizen and prospective absentee voter. It wholly fails to show that he will be injured in any property or civil right. Thus does [his] own pleading show him to be without standing or capacity to invoke equitable cognizance of a purely political question * * *." (Emphasis supplied.)

Holtz v. Babcock, 143 Mont. 341, 380, 390 P.2d 801, 805, was an action to enjoin the governor and other state officers from performing an agreement regarding an airplane lease. It was held that plaintiff lacked standing to sue as a citizen, resident, taxpayer and airplane owner. On petition for rehearing the Court stated:

> * * * The only complaint a taxpayer can have is when [the alleged state action] affects his pocketbook by unlawfully increasing his taxes. Appellant here does not allege any particular injury which he personally would suffer." (Emphasis supplied.)

In State ex rel. Conrad v. Managhan, 157 Mont. 335, 338, 485 P.2d 948, 950, the Court summarily stated: "* * * We hold that relators as affected taxpayers, have standing to bring a declaratory judgment action [against county assessors and the state board of equalization] concerning a tax controversy * * *." (Emphasis supplied.)

Chovanak v. Matthews, 120 Mont. 520, 525-527, 188 P.2d 582, 584-585, concerns an attack against the constitutionality of a statute rather than a challenge to particular agency action. However, we look to Chovanak for its general discussion of the principles of standing. There the plaintiff sued the state board of equalization for a declaratory judgment that a slot machine licensing act was constitutionally void. Plaintiff alleged he was a resident, citizen, taxpayer and elector of the county where the action was commenced. We quote Chovanak for the sound rules of jurisprudence enunciated:

> "It is by reason of the fact that it is only judicial power that the courts possess, that they are not permitted to decide mere differences of opinion between citizens, or between citizens and the state, or the administrative officials of the state, as to the validity of statutes. * * *
>
> "* * * The judicial power vested in the district courts and the Supreme Court of Montana, by the provisions of the Montana Constitution extend to such 'cases at law and in equity' as are within the judicial cognizance of the state sovereignty. Article 8, secs. 3, 11. By 'cases' and 'controversies' within the judicial power to determine, is meant real controversies and not abstract differences of opinion or moot questions. Neither federal nor state Constitution has granted such power. "* * *
>
> "The only interest of the appellant in the premises appears to be that he is a resident, citizen, taxpayer and elector of the county * * *. He asserts no legal right of his that the said board has denied him, and sets forth no wrong which they have done to him, or threatened to inflict upon him.
>
> "Appellant's complaint is in truth against the law, not against the board of equalization. He represents no organization that has been denied a slot machine license. He seeks no license for himself. In fact it appears from his complaint that slot machines, licensed or unlicensed, are utterly anathema to him. There is no controversy between him and the board of equalization.
>
> "* * * "It is held in Montana, as it is held in the United States Supreme Court, and by courts throughout the nation, that a showing only of such interest in the subject of the suit as the public generally has is not sufficient to warrant the exercise of judicial power. * * *"

It is clear from these Montana cases that the following factors constitute sufficient minimum criteria, as set forth in a
complaint, to establish standing to sue the state:

1) The complaining party must clearly allege past, present or threatened injury to a property or civil right.

2) The alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.

3) The issue must represent a "case" or "controversy" as is within the judicial cognizance of the state sovereignty.

With the foregoing criteria in mind, we hold plaintiff Associations have standing to seek judicial review of the
Department's actions under MEPA.

First, the complaint alleges a threatened injury to a civil right of the Associations' members, that is, the "inalienable * *
* right to a clean and healthful environment", Article II, Section 3, 1972 Montana Constitution. This constitutional provision, enacted in recognition of the fact that Montana citizens' right to a clean and healthful environment is on a parity with more traditional inalienable rights, certainly places the issue of unlawful environmental degradation within the judicial cognizance.

We have studied appellants' arguments that Article IX, Section 1, 1972 Montana Constitution, states that the legislature
shall provide for the enforcement of the state's duty to "maintain and improve a clean and healthful environment in Montana", and the legislature shall provide for "adequate remedies" to protect it.
We have studied the Constitutional Convention minutes surrounding Article IX and are aware the intent of the delegation was for the legislature to act pursuant to Article IX. But, we cannot ignore the bare fact that the legislature has not given effect to the Article IX, Section 1 mandate over a period of years. Moreover, the declaration of rights in Article II, the Article dealing with citizens' fundamental rights, gives "All persons" in Montana a sufficient interest in the Montana environment to enable them to bring an action based on those rights, provided they satisfy the other criteria set forth.

Intervenors urge this Court to consider the lengthy dissent in the Washington Leschi case as persuasive authority that the plaintiff Associations lack standing. The portion of that dissent relied upon, deals with the proposition the petitioners there came under no statutory grant of standing and were therefore excluded from the courts in a SEPA case. However, that dissent actually supports our holding here. The dissent assails the purported statutory creation of a "fundamental right" in SEPA upon which standing may be founded, and argues that a fundamental right can only be derived from the fundamental law. We concur and find an inalienable, or fundamental, right was created in our fundamental law, Article II, Section 3, 1972 Montana Constitution.

Second, the complaint alleges on its face an injury to the Associations which is distinguishable from the injury to the general public. When the plaintiffs do not rely on any statutory grant of standing, as here, courts must look to the nature of the interests of plaintiffs to determine whether plaintiffs are in a position to represent a "personal stake in the outcome of the controversy" ensuring an "adversary context" for judicial review. Sierra Club v. Morton, supra; Chovanak v. Matthews, supra. Both Associations allege, in effect, that they are relatively large, permanent, nonprofit corporations dedicated to the preservation and enhancement of wilderness, natural resources, wildlife and associated concerns. Both Associations allege substantial use of the public lands adjacent to Beaver Creek South by their members
for various recreational purposes. The Gallatin Sportsmen's Association contributed to the Department's Revised EIS by way of written comments to the draft environmental impact statement. These facts are sufficient to permit the Associations to complain of alleged illegal state action resulting in damage to the environment.

Third, there can be no doubt that unlawful environmental degradation is within the judicial cognizance of the state
sovereignty. The constitutional provisions heretofore discussed and MEPA itself unequivocally demonstrate the state's recognition of environmental rights and duties in Montana. The courts of the state are open to every person for the remedy of lawfully cognizable injuries. Article II, Section 16, 1972 Montana Constitution; Section 93-2203, R.C.M. 1947.

Finally, we reiterate these Associations are citizen groups seeking to compel a state agency to perform its duties according to law. This concept is novel in Montana only insofar as it is raised here in the context of the state's explicit environmental policy. Were the Associations denied access to the courts for the purpose of raising the issue of illegal state action under MEPA, the foregoing constitutional provisions and MEPA would be rendered
useless verbiage, stating rights without remedies, and leaving the state with no checks on its powers and duties under that act. The statutory functions of state agencies under MEPA cannot be left unchecked simply because the potential mischief of agency default in its duties may affect the interests of citizens without the

Associations' membership. United States v. SCRAP, supra.

The second major issue concerns the adequacy of the Revised EIS filed by the Department on the Beaver Creek South subdivision.

Throughout the argument Beaver Creek has maintained that MEPA has no bearing upon the Department's review of the proposed subdivision plant and an environmental impact statement is not required. If such statement is required, then Beaver Creek allies itself with the Department's position. The Department concedes that an environmental impact statement is required, but contends its responsibilities under MEPA are circumscribed by other statutory authority. In both Beaver Creek's and the Department's arguments, the thrust is that subdivision review has been comprehensively provided for in two acts hereinbefore cited: the Subdivision and Platting Act and the Sanitation in Subdivisions Act. They allege the clear legislative intent of the Subdivision and Platting Act is to place final subdivision approval authority in the hands of local government (e.g., section 11-3866, R.C.M. 1947), and the Department can interfere with town, city, or county subdivision approval only to the extent of its particular expertise and authority under the Sanitation in Subdivisions Act. Thus, they allege, if a Department environmental impact statement is required, it need deal in detail only with the environmental effects related to water supply, sewage disposal, and solid waste disposal.

Montana's Environmental Policy Act was enacted in 1971 and is patterned after the National Environmental Policy Act. It is a broadly worded policy enactment in response to growing public concern over the innumerable forms of environmental degradation occurring in modern society. The first two sections of MEPA state:

> "69-6502. Purpose of act. The purpose of this act is to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the state; and to establish an environmental quality council.
>
> "69-6503. Declaration of state policy for the environment. The legislative assembly, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density organization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Montana, in cooperation with the federal government and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans.
> "(a) In order to carry out the policy set forth in this act, it is the continuing responsibility of the state of Montana to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs, and resources to the end that the state may --
> "(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
> "(2) assure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
> "(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable or unintended consequences;
> "(4) preserve important historic, cultural, and natural aspects of our unique heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

"(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
"(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.
"(b) The legislative assembly recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

These sections unequivocably express the intent of the Montana legislature regarding environmental policy. But MEPA does more than express lofty policies which want for any means of legislative or agency implementation. Section 69-6504, R.C.M. 1947, contains "General directions to state agencies" and provides:

"The legislative assembly authorizes and directs that to the fullest extent possible.
"(a) The policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this act, and
"(b) all agencies of the state shall
"(1) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;
"(2) identify and develop methods and procedures, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;
"(3) include in every recommendation or report on proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on -
"(i) the environmental impact of the proposed action,
"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
"(iii) alternatives to the proposed action,
"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
"Prior to making any detailed statement, the responsible state official shall consult with and obtain the comments of any state agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate state, federal, and local agencies, .which are authorized to develop and enforce environmental standards, shall be made available to the governor, the environmental quality council and to the public, and shall accompany the proposal through the existing agency review processes. * * *"

The "detailed statement" described by subsection (b)(3) is referred to as the environmental impact statement, or EIS.
Appellants emphasize that the Subdivision and Platting Act was passed two years after MEPA, and this circumstance expresses a legislative intent that local review of environmental factors, particularly under sections 11-3863 and 11-3866, R.C.M. 1947, obviates the necessity for departmental review. Such an interpretation, however, conflicts with the terms of MEPA, in section 69-6507, R.C.M. 1947: "The policies and goals set forth in this act are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state."

Had the legislature intended local review to replace the rigorous review required by responsible state agencies, it could
easily have so stated. The existing statutes evince a legislative intent that subdivision decisions be made at the local planning level based upon factors with an essentially local impact, and that state involvement triggers a comprehensive review of the environmental consequences of such decisions which may be of regional or statewide importance.

An illustration of this interpretation is provided by a comparison of the provisions of MEPA, hereinbefore set forth, with certain provisions of the Subdivision and Platting Act. The statement of policy in the Subdivision and Platting Act contains a
mandate to "require development in harmony with the natural environment", section 11-3860, R.C.M. 1947. Section 11-3863 (1), R.C.M. 1947, requires local governing bodies to adopt regulations and enforcement measures for, inter alia, "the avoidance of subdivision which would involve unnecessary environmental degradation * * *." Subsection (2) requires the department of community affairs to prescribe minimum requirements for local government subdivision regulations, including "criteria for the content of the environmental assessment required by this act."
Subsection (3) provides that this "environmental assessment" must be submitted to the governing body by the subdivider. Subsection (4) describes the environmental assessment which emphasizes research as to water, sewage, soil and local services. While these factors may be among the more significant immediate environmental problems created by a subdivision, an assessment of them does not approach the scope of the inquiry required by MEPA section 69-6504, R.C.M. 1947.

Furthermore, there is no irreconcilable repugnancy between these acts which would render either the Subdivision and Platting Act or MEPA a nullity. It is suggested the district court's judgment leads to the proposition that the Department could "veto" a local subdivision approval solely on the basis of its EIS -- in direct contravention of the intent of the Subdivision and Platting Act. While this "veto" prospect is feasible, two points are disregarded by the argument. First, MEPA was enacted to mitigate environmental degradation "to the fullest extent possible".
Second, MEPA does not call for a halt to all further development; its express direction to agencies is to "utilize a systematic, interdisciplinary approach" to foster sound environmental planning and decision making. A state agency acting pursuant to this directive does not invoke the specter of state government vetoing viable local decisions. The concurrent functions of local and state governments with respect to environmental decisions serve to enhance the environmental policy expressed in all of the statutes here considered, that action be taken only upon the basis of well-informed decisions.

Thus, the statutes must be read together as creating a complementary scheme of environmental protection. As stated in Fletcher v. Paige, 124 Mont. 114, 119, 220 P.2d 484, 486:

> "The general rule is that for a subsequent statute to repeal a former statute by implication, the previous statute must be wholly inconsistent and incompatible with it. United States v. 196 Buffalo Robes, 1 Mont. 489, approved in London Guaranty & Accident Co. v. Industrial Accident Board, 82 Mont. 304, 309, 266 P. 1103, 1105. The court in the latter case continued: 'The presumption is that the Legislature passes a law with deliberation and with a full knowledge of all existing ones on the same subject, and does not intend to interfere with or abrogate a former law relating to the same matter unless the repugnancy between the two is irreconcilable.' See: City of Billings v. Smith, 158 Mont. 197, 490 P.2d 221; State ex rel. Esgar v. District Court, 56 Mont. 464, 185 P. 157.

Support for our interpretation of the scope of MEPA is found in a leading federal case interpreting the NEPA. In Calvert
Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1112, 17 A.L.R.Fed. 1 (1971), regulations proposed by the Atomic Energy Commission (AEC) were challenged on the basis that the proposed regulations did not adequately provide for consideration of all environmental factors as mandated by NEPA. The AEC argued that its authority extended only to nuclear related matters and that it was prohibited from independently evaluating and balancing environmental factors which were considered and certified by other
federal agencies. The Calvert Cliffs' court found the AEC's interpretation of NEPA unduly restricted, stating:

> "NEPA * * * makes environmental protection a part of the mandate of every federal agency and department. The Atomic Energy Commission, for example, had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions. Now, however, its

hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account."

The district court was correct in treating MEPA as the controlling statute in this case. The district court held the Revised EIS does not comply procedurally with MEPA on eight separate grounds. The court expressly declined to venture into a review of the substantive merits of the Department's reasoning and conclusions.

A preliminary question is the inquiry into the proper scope of review of the Revised EIS by the courts. Because MEPA is modeled after NEPA, it is appropriate to look to the federal interpretation of NEPA. This Court follows the rule found in Ancient Order of Hiberians v. Sparrow, 29 Mont. 132, 135, 74 P. 197, 198:

> "* * * that the construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and * * * only strong reasons will warrant a departure from it.'"

Again, in State v. King Colony Ranch, 137 Mont. 145, 151, 350 P.2d 841, 844:

> "The State Board of Equalization was and is warranted in following the Federal interpretation of the language which the Legislature of this state adopted from the Act of Congress." See: Cahill-Mooney Construction Co. v. Ayres, 140 Mont. 464, 373 P.2d 703; Roberts v. Roberts, 135 Mont. 149, 338 P.2d 719; Lowe v. Root, 166 Mont. 150, 531 P.2d 674.

In determining the proper scope of judicial review of environmental impact statements under NEPA, the federal courts have framed the question in terms of whether NEPA is merely a procedural statute or whether it is a substantive statute creating substantive duties reviewable by the courts. See Note: The Least Adverse Alternative Approach to Substantive Review under NEPA, 88 Harvard Law Review 735 (1975). However because the district court ruled on procedural grounds, we limit our inquiry to procedural matters.

The United States Supreme Court recently stated in Aberdeen & Rockfish R.R. Co. v. SCRAP, 422 U.S. 289, 95 S.Ct. 2336, 2355, 45 L.Ed.2d 191, 215 (1975):

> "* * * NEPA does create a discreet procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal actions * * *."

In Calvert Cliffs', supra, (449 F.2d 1109, 1115), the District of Columbia Court of Appeals stated:

> "* * * But if the decision was reached procedurally without individualized consideration and balancing of environmental factors -- conducted fully and in good faith -- it is the responsibility of the courts to reverse. * * *"

The Ninth Circuit Court of Appeals firmly bases its reviewing standard on the federal Administrative Procedure Act. Lathan v. Brinegar, 9 Cir., 506 F.2d 677 (1974); Cady v. Morton, 9 Cir., 527 F.2d 786 (1975); Trout Unlimited v. Morton, 9 Cir., 509 F.2d 1276, 1282, 1283 (1974). In Trout Unlimited the court expanded on its explanation:

> "The 'without observance of procedure required by law' Sec. 706(2)(D) standard, however, is less helpful in reviewing the sufficiency of an EIS than one might wish * * *
> "* * *
> "It follows, therefore, that in determining whether the appellees prepared an adequate EIS we will be guided in large part by 'procedural rules' rooted in case law. * * * All such rules should be designed so as to assure that the EIS serves

> substantially the two basic purposes for which it was designed. That is, in our opinion an EIS is in compliance with NEPA when its form, content, and preparation substantially (1) provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information."

We are also mindful that the policies set forth in section 69-6503, R.C.M. 1947, are to be implemented by state agencies in accordance with sections 69-6504(a) and 69-6507, R.C.M. 1947.

In light of the foregoing, the scope of judicial review of the Revised EIS in this case is limited to a consideration of whether the Department provided a sufficiently detailed consideration and balancing of environmental factors which will ensure that the procedure followed will give effect to the policies of MEPA, aid the Department in decision making, and publicize the environmental-impact of its action.

We will consider each factor of the Revised EIS found legally deficient by the district court in the sequence set forth in its opinion.

The district court held the Department failed to include in the Revised EIS anything rising to the dignity of an economic analysis, as required by MEPA and by House Joint Resolution No. 73, approved March 16, 1974. A joint resolution is not binding as law on this Court, but we give it consideration as a clear manifestation of the legislative construction of MEPA. State v. Toomey, 135 Mont. 35, 335 P.2d 1051; State ex rel. Jones v. Erickson, 75 Mont. 429, 244 P. 287. House Joint Resolution No. 73 states in relevant part:

> "WHEREAS, it is a matter of serious concern to the legislature that this enactment [MEPA] be fully implemented in all respects,
> "NOW, THEREFORE, BE IT RESOLVED * * *
> "That all agencies of state government are hereby directed to achieve forthwith the full implementation of the Montana Environmental Policy Act including the economic analysis requirements of sections 69-6504 through 69-6514 * * * and
> "* * * that economic analysis shall accompany environmental impact statements as required by the foregoing sections of the act and shall encompass an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects * * *."

With the exception of a discussion of educational costs, the Revised EIS contains scant economic analysis. The Department seeks to explain this away with a reference to the function of local governing bodies in compiling economic data, and states it would be a duplication of effort for the Department to so engage itself. Earlier in this opinion we discussed this attempt to circumvent the intent of MEPA as expressed by the legislature -- in this instance as recently as 1974. The Department may not abdicate its duties under MEPA to local governments.

The cost-benefit analysis required by MEPA, as construed by the legislature, encompasses a broad consideration of several factors categorized in House Joint Resolution No. 73, approved March 16, 1974. A reasonable cost-benefit economic analysis undertaken pursuant to these criteria would, in effect, accomplish most of the purposes sought to be served by an environmental impact statement. Here, for example, the Revised EIS asserts that Beaver Creek South will provide necessary housing for many employees at nearby Big Sky of Montana. This comment, however, is not accompanied by any data to support the conclusion that Big Sky employees could afford, or would desire, to live at Beaver Creek South. In other words, the Revised EIS does not consider or disclose the approximate costs of the residential units, the average incomes of Big Sky employees, or even the likelihood that this projected housing use will come to pass. Such data is contemplated by MEPA.

The Department clearly ignored its duties to provide an economic analysis in its Revised EIS, as the district

court found.
Also the cooperative inter- and intra-governmental approach fostered by MEPA section 69-6503, R.C.M. 1947, should encourage the free exchange of data compiled by local and state agencies; if the local government prepares an economic analysis, such could be incorporated as part of the Department's environmental impact statement.

The gist of the Revised EIS, p. 23, with respect to aesthetic considerations is demonstrated by its comments on visual impact:

> "A visual impact would certainly result from the proposed development. The severity of this visual impact is purely speculation, and the desirability is a matter of personal aesthetic values.
> "* * *
> "* * * Any development, including the proposed Beaver Creek South, placed within this scenic canyon setting would be considered aesthetically offensive by a majority of people."

Again, the Revised EIS, p. 24, affirms that visual impact is a matter of "speculation" because "Economists have not developed an acceptable process to place an economic valuation on such intangibles as aesthetics."

This latter comment betrays a fundamental weakness of the Department's approach to its responsibilities under MEPA. In decrying the absence of a precise quantitative or qualitative measure, the Department ignores the recognition of this variable factor in section 69-6504(b)(2), as one which must "be given appropriate consideration in decision making along with economic and technical considerations". (Emphasis supplied). Under section 69-6504(b)(3)(i), the Department is required to prepare a detailed statement on "the environmental impact of the proposed action" and visual impact falls within the meaning of this subsection. There is no detailed description of the design of the proposed residential units, the compatibility of the architecture with the surrounding landscape, the obstruction or availability of views, or the relationship of the open spaces to these factors. The Revised EIS comments in this regard are not sufficiently detailed under any standard conceivable to give meaning to the act or inform decision makers and the public of the probable aesthetic consequences of the development.

Section 69-6504(b)(3)(iii), R.C.M. 1947, requires an environmental impact statement to contain "alternatives to the proposed action". Section 69-6504(b)(4), R.C.M. 1947, requires agencies to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources". The latter section appears to be operable whether or not an environmental impact statement is prepared. Trinity Episcopal School Corporation v. Romney, 8 ERC 1033, 523 F.2d 88, (2d Cir. 1975). The district court correctly concluded the subsection (b)(4) description is to be included in a subsection (b)(3) environmental impact statement.

However, the district court erred in its opinion that discussion of alternatives in the Revised EIS is "patently inadequate". The district court merely viewed the last two pages of the Revised EIS under the "Alternatives" heading, wherein various alternatives are essentially stated as conclusions. This review ignores the reasonable discussion of alternatives contained in other portions of the Revised EIS regarding such factors as water supply, wastewater, and police and fire protection. As stated by the Ninth Circuit Court of Appeals in Life of the Land v. Brinegar, 9 Cir., 485 F.2d 460, 472(1973):

> "NEPA's 'alternatives' discussion is subject to a construction of reasonableness. * * * Certainly, the statute should not be employed as a crutch for chronic fault-finding. Accordingly, there is no need for an EIS to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative."

The discussion of alternatives in the Revised EIS viewed in its entirety is sufficiently detailed to comply with the procedural requirements of MEPA. The Revised EIS contains reproductions of lengthy comments from the state Department of Fish and Game and the Gallatin Sportsmen's Association regarding impact of the proposed development on wildlife in the Gallatin Canyon. Other comments are also mentioned. All of the comments indicated that an adverse environmental effect on wildlife could not be avoided if the proposal were to be implemented. Section 69-6504(b)(3) (ii), R.C.M. 1947. The Revised EIS, p. 28, rather than dealing with a consideration of these adverse effects, contains a pro-tracted discussion of the legislative history of the

Subdivision and
Platting Act and the local level hearings on the instant plat proposal, and concludes by stating:

> "Therefore, there is an opportunity to effect rejection or revision of a subdivision for environmental reasons at the county level. This would appear to satisfy the spirit in which the Montana Environmental Policy Act was enacted."

We find this justification for inaction and ad hoc agency "legislating" to be inappropriate in an environmental impact statement. The Department's responsibility in pursuing its duties under MEPA is to consider all relevant environmental values along with other factors and come to a conclusion with regard to them. Although we do not suggest the Department has the internal resources and expertise with which to expand upon or refute the wildlife comments received from outside sources, we do hold it is within the Department's province under MEPA to reach its decision based upon a procedure which encompasses a consideration and balancing of environmental factors. The district
court was correct in holding that the mere transmittal of comments adverse to the proposal is insufficient.

The department of Highways commented on the effect of the proposed subdivision with respect to traffic flow on U.S. Highway 191. The Department of Highways states the Beaver Creek South Subdivision "will generate a large amount of traffic", citing figures, and states this increased volume "will not warrant the construction of a four lane facility in this vicinity." Several challenging comments call for more detailed and accurate information, but the Revised EIS, at p. 33, states the Department of Highways reaffirms its statement and on that basis says: "* * * Beaver Creek South would not be the development that would make reconstruction [of the highway] necessary."

The district court found this portion of the Revised EIS lacking because the treatment of highways was "incomplete", there was no discussion of the effect of future highway construction, and also no discussion of cumulative social, economic and environmental impacts of continued development in the Gallatin Canyon.

We believe the highway discussion is procedurally adequate and that the district court's opinion on this point requires an
unwarranted clairvoyance on the part of the Department. In contradistinction to the wildlife discussion where the agency with the greatest expertise in the field (Department of Fish and Game) raised serious adverse questions which were not addressed, here the Department is justified in relying on the Department of Highways projections for future traffic flow. The published comments and accompanying discussion demonstrate a reasonable consideration and balancing of environmental factors.

Comments of Montana Power Company in the Revised EIS indicate to the Department that the company would have "no
problem" in supplying the electricity needs of the proposed subdivision, and that this capacity could be met with present transmission lines. The Revised EIS notes at p. 36, that the proposed subdivision "would be a contributing factor toward any future necessity for additional service." The adverse comments to this in the Revised E1S concentrate on the issue of whether or not Montana Power Company is counting on the use of a proposed new power line into the canyon from the west. The Department's conclusion does not dispute the information provided it by the power company. The district court held that this analysis is superficial at best.

The energy needs of the Gallatin Canyon with respect to Beaver Creek South, and future development, are sufficiently
considered and balanced in the Revised EIS. The Department, through its inclusion in the Revised EIS of conflicting comments, cannot be expected to provide detail beyond that which is reasonably foreseeable. The Department reasonably concluded the proposed development would contribute to the total power needs of the area and to any future necessity for additional service. This constitutes procedural compliance with MEPA in that the Departmental decision makers are made aware of the environmental consequences regarding energy, and the same information is made available to other branches of government and the public. Trout Unlimited v. Morton, 509 F.2d 1276.

The district court held that the "actual necessity" for the proposed subdivision must be analyzed. As the appellants correctly point out, there is no provision in MEPA which requires a study of necessity. Therefore, the district court's opinion on this point is erroneous.

We point out, however, the necessity of the project was gratuitously introduced into the Revised EIS by the Department in order to publish therein a letter by Big Sky of Montana, Inc. which suggests that the Beaver Creek South subdivision will
alleviate a housing shortage for employees at Big Sky. In response to several challenging comments received by the Department, the Revised EIS then reverses its earlier position by stating that the objections may be valid, but they have no bearing on whether or not to approve the plat.

This turnabout of the Department within the Revised EIS evidences an attitude that an environmental impact statement is simply window dressing to pacify opponents of the Department's actions. MEPA was not enacted

to provide the government and public with project justifications by state agencies. We hold that if the Department deems the necessity of the development to be a critical factor in its analysis of the impact of the proposed subdivision, then it is bound at least to make a reasonable consideration of the necessity of the project in light of the reasonable objections made to the necessity premise.

The district court held that cumulative impacts must be discussed in greater detail. The Revised EIS contains a detailed analysis of the cumulative impact of increasing the nutrient load in the Gallatin River from the subdivision's domestic water sources. No other cumulative impacts are discussed in the same portion of the Revised EIS. However, the Revised EIS as a whole contains several references to anticipated future environmental impacts in the vicinity, and a reasonably detailed summary of the pending comprehensive plan for the Gallatin Canyon Planning Study Committee. This constitutes a sufficiently detailed consideration and disclosure regarding "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity". Section 69-6504(b)(3)(iv), R.C.M. 1947.

In summary, the Revised EIS is procedurally inadequate in its analyses of economic costs and benefits, aesthetic considerations, and wildlife factors. This holding is not to be construed as a mandate for technical perfection; rather, we find simply that the Revised EIS does not sufficiently consider and balance the full range of environmental factors required under the terms of MEPA. If the policy and purpose of MEPA are to have any practical meaning, state agencies must perform their duties pursuant to the directives contained in that Act.

Having found that the district court correctly declared the Revised EIS to be procedurally inadequate and void, the final question is whether plaintiff Associations are entitled to injunctive relief as ordered by the district court.

The rule is well settled that injunction actions by private parties against public officials must be based upon irreparable injury and a clear showing of illegality. State ex rel. Keast v. Krieg, 145 Mont. 521, 402 P.2d 405. Environmental damage as alleged by the Associations is an injury within the scope of the judicial cognizance. Furthermore, the preceding discussion indicates the Revised EIS does not meet the minimum requirements of the law under MEPA and is clearly illegal.

The Department and Beaver Creek allege an injunction is barred by section 93-4203(4), R.C.M. 1947, which states:

> "An injunction cannot be granted:
> "* * *
> "(4) To prevent the execution of a public statute, by officers of the law, for the public benefit."

This argument overlooks the cases which hold that illegal actions by public officials may be enjoined. In Larson v. The State of Montana and the Department of Revenue, 166 Mont. 449, 534 P.2d 854, 32 St.Rep. 377, 384, this Court overruled the dicta in Keast to the effect than an injunction against public officers was banned by section 93-4203(4), stating:

> "The preferable law is enunciated in Hames v. City of Polson, 123 Mont. 469, 479, 215 P.2d 950, where it was held: " '* * * public bodies and public officers may be restrained by injunction from proceeding in violation of law, to the prejudice of the public, or to the injury of individual rights * * *.'"

We affirm the district court holding that injunctive relief is proper in this case.

The summary judgment is affirmed.

MR. JUSTICE DALY dissenting:

Time being short and to preclude another opinion I again dissent and comment that my original objection to legal principles concerning standing to bring suit have not been discussed nor answered.

Dept. of Agriculture
Dated Feb. 5, 1988

VOLUME NO. 42 OPINION NO. 62

AGRICULTURE, DEPARTMENT OF - Department required to comply with MEPA for grasshopper spraying program;
MONTANA ENVIRONMENTAL POLICY ACT - Department of Agriculture required to comply with MEPA for grasshopper spraying program;

MONTANA ENVIRONMENTAL POLICY ACT - Emergency exception to MEPA allowed only when immediate action required and not reasonably foreseeable;

PESTICIDES - Pesticide spraying for grasshopper control requires compliance with MEPA where state participates with funding and expertise;
MONTANA CODE ANNOTATED - Title 10, chapter 3; Title 75, chapter 1; Title 80, chapter 7, part 5; sections 10-3-405, 75-1-103, 75-1-201;
ADMINISTRATIVE RULES OF MONTANA - Title 4, chapter 2, sub-chapter 3; sections 4.2.303, 4.2.307, 4.2.308.

HELD: 1. The participation of the State of Montana in a grasshopper spraying program in which the state pays up to one-third of the costs and provides financial management and technical expertise, is a major state action in which compliance with the terms of the Montana Environmental Policy Act is required.

2. While an emergency situation is a legitimate exception to the requirements of MEPA, the Montana Department of Agriculture should, in the future, comply with MEPA before participating in a grasshopper spraying program, if the need for such program is reasonably foreseeable.

5 February 1988

Keith C. Kelly, Director
Department of Agriculture
Scott Hart Building
303 Roberts
Helena MT 59620

Dear Mr. Kelly:

On June 1, 1987, Governor Schwinden issued a proclamation declaring that an infestation of grasshoppers constituted an emergency in the State of Montana. The effect of the proclamation was to make available up to $200,000 of state disaster and emergency funds for expenditure under the provisions of Title 80, chapter 7, part 5, MCA. That part of Title 80 provides authority for the Montana Department of Agriculture (hereinafter the Department) to participate with counties in a program of cropland spraying for the purpose of controlling insect infestations.

In this instance, the Department adopted a set of emergency rules setting forth the specific requirements for counties and individuals to participate in the program. Each county had to elect participation and was required to levy two mills pursuant to authority contained in section 10-3-405, MCA. Further rules pertaining to landowners established the dates by which applications must be made and the reimbursement procedures. The state, through the Disaster and Emergency Services Division of the Department of Military Affairs, provided financial management of the program. The state also limited its total financial participation to one-third of the overall cost of the program or $200,000, whichever was less.

The emergency rules also required participating counties to enter into a pest management agreement with the Department. Neither the emergency rules nor the pest management agreement clearly stated the division of

authority between the state, the county, and the landowner. The basic plan was that the landowner could either do his own spraying or contract for the spraying of grasshoppers by an independent contractor. The landowner could then be reimbursed for a portion of his costs by the county and the state depending on the amount of funds that each had available and the number of participating landowners. The Department also made available technical expertise in pest management and conducted the survey to document the extent of the grasshopper infestation.

The Montana Environmental Policy Act (Tit. 75, ch. 1, MCA) (hereinafter MEPA), mandates that "it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources" in order to attain certain goals. Sec. 75-1-103(2), MCA. Among the goals enumerated are to

> (b) assure for all Montanans safe, healthful, productive, and aesthatically and culturally pleasing surroundings; [and]
>
> (c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences[.]

Sec. 75-1-103(2), MCA.

In order to assure that these values are reflected in the decisions of government agencies, the Legislature has required that the agency shall, "to the fullest extent possible[,]" include an environmental impact statement (hereinafter EIS) "in every recommendation or report on proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment[.]" Sec. 75-1-201(1) (b) (iii), MCA.

MEPA gives no further guidance on what constitutes "major state action." However, in implementing MEPA the Department itself has adopted certain procedural rules (Tit. 4, ch. 2, sub-ch. 3, ARM), one of which addresses the determination of whether an environmental impact statement is required:

> (3) The following are categories of actions which normally require the preparation of an EIS:
>
> (a) actions which may significantly affect environmental attributes recognized as being endangered, fragile, or in severely short supply;
>
> (b) actions which may be either significantly growth inducing or growth inhibiting;
>
> (c) actions which may substantially alter environmental conditions in terms of quality or availability; or
>
> (d) actions which will result in substantial cumulative impacts.

Sec. 4.2.303(3), ARM.

There has been very little judicial interpretation of MEPA requirements in Montana. However, the Montana Supreme Court has indicated that federal interpretations of parallel provisions of the National Environmental Policy Act (hereinafter NEPA) may be looked to for guidance. Kadillak v. Anaconda Co., 184 Mont. 127, 602 P.2d 147, 153 (1979).

The subject of pesticide spraying is indisputably one which most courts have found to be within the ambit of NEPA since such spraying may well have "an impact on man's environment" (Sec. 75-1-201(1)(b)(i), MCA). See Annot., 74 A.L.R. Fed. 249. See also Alaska Survival v. Weeks, 18 Env't Rep. Cas. (BNA) 1814 (Alaska 1981);

State of Wisconsin v. Butz, 389 F. Supp. 1065 (E.D. Wis. 1975). The more critical inquiry is whether the state involvement in the grasshopper spraying program constitutes "major state action" sufficient to trigger the requirements of MEPA.

As outlined earlier, the state's role in the spraying program was to provide a maximum of one-third of the cost of the program and to supervise the financial administration of the program. Certain technical expertise was also provided. The actual spraying was done by landowners contracting with local businesses to provide the service or doing it themselves.

The only Montana Supreme Court case which has dealt with the application of MEPA to programs involving different levels of government and the private sector is Montana Wilderness Association v. Board of Health and Environmental Sciences, 171 Mont. 477, 559 P.2d 1157 (1976). Under the facts of that case and without delineating any test to aid in future determinations, the Court found that the subdivision review process, conducted pursuant to the Montana Subdivision and Platting Act, was essentially a local process and was not within the scope of MEPA. By its terms, MEPA applies to "all agencies of the state" (Sec. 75-1-201, MCA), and not to local government entities. Montana Wilderness Association is thus of limited value to the issue presented here because it did not involve any financial participation by the state.

This paucity of authority in Montana again leads to a review of decisions interpreting the federal act. In the analogous area of categorical grants by the federal government to local and state governments, one commentator has stated that "[s]tate and local projects that receive federal financial assistance are subject to NEPA." D. Mandelker, NEPA Law & Litigation sec. 5.13 (1984). The leading case in this area appears to be Save the Courthouse Committee v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975). In that case, the court determined that the participation of the United States Department of Housing and Urban Development in a local urban renewal plan was sufficient to require an EIS. The federal agency had participated financially by giving grants and loan guarantees although there was local decisionmaking by both private entities and local government units. Other cases have reached the same result where the participating federal agency made a loan to a nonfederal entity (Proette v. Dent, 484 F.2d 1146 (2d Cir. 1973)) and where federal mortgage insurance was available (Wilson v. Lynn, 372 F. Supp. 934 (D. Mass. 1974)).

In NORML v. U.S. Drug Enforcement Administration, 545 F. Supp. 981 (D.D.C. 1982), the issue was whether the federal Drug Enforcement Administration (DEA) had to prepare an EIS for a paraquat spraying program undertaken by the State of Florida. The court found that while the federal agency gave general assistance grants for law enforcement to the State of Florida, none of the money was earmarked for the spraying program. The State of Florida said it would do the spraying even without federal involvement. Since it found no direct financial assistance by the federal agency to the spraying program, the court ruled that there was no "major federal action."

In State of Alaska v. Andrus, 591 F.2d 537 (9th Cir. 1979), the court similarly underscored that federal financial participation is often the touchstone for finding that NEPA applies to the federal action. The court stated:

> There can be major federal action when the primary actors are not federal agencies, but rather state or local governments, or private parties. Most courts agree that significant federal funding turns what would otherwise be a local project into a major federal action. See Homeowners Emergency Life Protection Committee v. Lynn, 541 F.2d 814 (9th Cir. 1976) (per curiam) (federal disaster-relief funding for municipal dam and reservoir

project).

591 F.2d at 540.

This review of federal decisions interpreting NEPA indicates that federal financial participation in a nonfederal project is usually sufficient to bring the agency's action under NEPA. As stated in NEPA Law & Litigation S 8.25:

> In most cases in which a federal agency makes a direct categorical grant for a nonfederal project, the use of federal funds for the project is sufficient to bring it under NEPA.

Applying these precedents to the facts under review here, it is clear that the participation of the State of Montana in providing up to one-third of the funding for the grasshopper spraying program together with financial management and technical expertise is a major state action for MEPA purposes.

Another aspect of this matter is the proclamation of emergency issued by the Governor of Montana pursuant to his authority under Title 10, chapter 3, MCA. You have inquired whether MEPA applies to state action that involves an emergency.

The MEPA rules adopted by the Department of Agriculture deal with the issue of emergency. Section 4.2.308, ARM, provides as follows:

> (1) Emergencies. The department of agriculture may take or permit action having a significant impact on the human environment in an emergency situation without preparing an EIS. Within 30 days following initiation of the action, the department of agriculture shall notify the governor and the EQC as to the need for such action and the impacts and results of it. Emergency actions shall be limited to those actions necessary to control the immediate impacts of the emergency.

In this instance the Department did not follow the directive of that rule in filing a report with the Governor and the Environmental Quality Council, perhaps because it felt its action was not covered by MEPA even in a nonemergency situation.

It is, of course, necessary that MEPA be construed to allow for an exception to its requirements in emergency situations since it would otherwise deter the state's ability to respond to situations of great need. However, the emergency exception should not be used to avoid the provisions of MEPA.

I am reluctant to determine whether the emergency exception was properly invoked here because all of the pertinent facts are not before me. I nonetheless note that, because severe grasshopper infestations have occurred during the last three years, the Department is adequately on notice that future spraying may be necessary. Further reliance on the emergency exception, therefore, appears inappropriate. The emergency exception must be used sparingly and only when (1) immediate action is required, and (2) the necessity or nature of the action was not reasonably foreseeable.

Finally, I note that under the Department's rules it has authority to adopt a so-called programmatic EIS. Sec. 4.2.307, ARM. The programmatic EIS is designed to review ongoing programs of the Department and actions which it may be required to undertake in the future. The virtue of the programmatic EIS is that it is done before the Department is confronted with an emergency situation, and yet it provides for a consideration of the values embodied in MEPA. It appears that the programmatic EIS may be the desirable way for the Department to meet the requirements of MEPA and be able to respond readily when confronted by an immediate need to deter a grasshopper infestation.

THEREFORE, IT IS MY OPINION:

1. The participation of the State of Montana in a grasshopper spraying program in which the state pays up to one-third of the costs and provides financial management and technical expertise, is a major state action in which compliance with the terms of the Montana Environmental Policy Act is required.

2. While an emergency situation is a legitimate exception to the requirements of MEPA, the Montana Department of Agriculture should, in the future, comply with MEPA before participating in a grasshopper spraying program, if the need for such program is reasonably foreseeable.

Very truly yours,

MIKE GREELY
Attorney General

MT Board of Investments
Dated Jun. 21, 1990

VOLUME NO. 43 **OPINION NO. 62**

INVESTMENTS, BOARD OF - Applicability of environmental impact statement requirements to loan participation decisions;
LAND USE - Applicability of environmental impact statement requirements to loan participation decisions by Board of Investments;
MONTANA ENVIRONMENTAL POLICY ACT - Applicability of environmental impact statement requirements to loan participation decisions by Board of Investments;
NATURAL RESOURCES - Applicability of environmental impact statement requirements to loan participation decisions by Board of Investments;
PUBLIC FUNDS - Applicability of environmental impact statement requirements to loan participation decisions by Board of Investments;
STATE AGENCIES - "Major action of" for purpose of environmental impact statement requirements;
ADMINISTRATIVE RULES OF MONTANA - Sections 8.2.301 to 8.2.328, 8.97.407 to 8.97.409;
CODE OF FEDERAL REGULATIONS - 40 C.F.R. ^U 1508.18(a);
MONTANA CODE ANNOTATED - Sections 17-6-301 to 17-6-331, 17-6-302 to 17-6-304, 17-6-306, 17-6-308 to 17-6-310, 17-6-312, 75-1-101 to 75-1-324, 75-1-102, 75-1-103, 75-1-105, 75-1-201, 82-4-301 to 82-4-362, 82-4-337;
MONTANA LAWS OF 1983 - Chapter 677;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 62 (1988);
UNITED STATES CODE - 42 U.S.C. sec. 4321-4347, 42 U.S.C. ^U 4332.

HELD: The Montana Board of Investments must comply with the environmental impact statement requirements of the Montana Environmental Policy Act when the Board considers whether to enter into a loan participation agreement where the underlying project benefiting from the agreement may significantly affect the quality of the human environment.

June 21, 1990

Michael J. Mulroney
P.O. Box 1144
Helena MT 59624

Dear Mr. Mulroney:

On behalf of the Montana Board of Investments, you have requested my opinion concerning the following question:

> Is the Montana Board of Investments obligated to comply with the environmental impact statement requirements of the Montana Environmental Policy Act before entering into loan participation agreements pursuant to section 17-6-312, MCA?

I conclude that decisions to enter into loan participation agreements by the Board of Investments constitute "major actions of state government" within the scope of section 75-1-201(1)(b)(iii), MCA, of the Montana Environmental Policy Act and that environmental impact statements therefore must be prepared to the fullest extent possible in connection with such decisions when the financed project may significantly affect the quality of the human environment.

In 1982 Montana voters approved Initiative No. 95. The initiative directed that, in addition to other income, 25 percent of all revenue deposited after June 30, 1983 into the permanent coal tax trust fund "be invested in the Montana economy with special emphasis on investments in new or expanding locally-owned enterprises." Mont. Initiative No. 95 ^U 3(1) (Nov. 1982). The initiative further provided that such revenue could not be used to make "direct loans." Id. at ^U 3(3). A second component of the initiative was creation of the Montana Economic Development Fund, but expenditures from that fund are not at issue here.

In response to Initiative No. 95 the Legislature adopted the Montana In-State Investment Act of 1983 ("Investment Act"). 1983 Mont. Laws, ch. 677 (codified as amended at ^U^U 17-6-301 to 331, MCA). The Investment Act established the Montana In-State Investment Fund financed substantially by the 25 percent

permanent coal tax trust fund revenue allocation under Initiative No. 85 and principal payments made on investments from the fund. ^U 17-6-306, MCA. The Montana Board of Investments ("Board") is responsible for investing the fund's assets (^U 17-6-308(1), MCA) but, consistent with the provisions of Initiative No. 95, the Investment Act proscribes use of the fund "to make direct loans to individual borrowers" (^U 17-6-310(2), MCA). It does authorize agreements for "loan participation," defined in section 17-6-302(8), MCA, as "loans or portions thereof bought from a financial institution[,]" and limits such participation to 80 percent of the outstanding loan unless the loan is one guaranteed by a federal agency. ^U 17-6-312(1), MCA; see ^U^U 8.97.407 to 8.97.409, ARM. The financial institution issuing the underlying loan is responsible for servicing the loan and remitting to the Board its proportionate share of principal and interest payments.

The Montana Environmental Policy Act ("MEPA"), ^U^U 75-1-101 to 324, MCA, was adopted in 1971, and its purpose is to "encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, [and] to enrich the understanding of the ecological systems and natural resources important to the state." ^U 75-1-102, MCA. Among its express policies is use of "all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans." ^U 75-1-103(1), MCA. MEPA's policies and goals supplement those otherwise existing for state agencies. ^U 75-1-105, MCA.

The core substantive provision in MEPA is section 75-1-201, MCA, and subsection 1(b)(iii) of that provision mandates the preparation of environmental impact statements under certain conditions:

> (1) The legislature authorizes and directs that, to the fullest extent possible:
>
> ....
>
> (b) all agencies of the state, except as provided in subsection (2), shall:
>
> ....
>
> (iii) include in every recommendation or report on proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on:
>
> (A) the environmental impact of the proposed action;
>
> (B) any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (C) alternatives to the proposed action;
>
> (D) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
>
> (E) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented[.]

The only state agency expressly excluded from the requirements of section 75-1-201, MCA, is the Department of Public Service Regulation in the exercise of its regulatory authority over rates and charges of railroads, motor carriers and public utilities. ^U 75-1-201(2), MCA.

The Board has adopted no regulations to implement any responsibilities it may have under MEPA and does not prepare environmental impact statements prior to determining whether to enter into a loan participation agreement--even where the private-borrower activity giving rise to the agreement may significantly affect the quality of the human environment.

As a preliminary matter, I am constrained to reject any claim that the Board has a blanket dispensation from the obligations imposed under MEPA. First, as stated, the only agency excluded from the statute's requirements is the Department of Public Service Regulation with respect to one aspect of its responsibilities. Second, unlike the Department of State Lands which, when processing permit applications under a prior version of section 82-4-337, MCA, in the Hard Rock Mining Act, ^U^U 82-4-301 to 362, MCA, was permitted to proceed without an environmental impact statement, the Board has no legislatively prescribed time limits in its decisionmaking under the Investment Act which "preclude[] the statutory duty of preparing an EIS." Kedillak v. Anaconda Company, 184 Mont. 127, 138, 602 P.2d 147, 153 (1979). Third, such a blanket exception would be inconsistent with provisions governing use of the investment fund. That fund is substantially financed by monies from the permanent coal tax trust fund whose statutory purposes include under section 17-6-303(2), MCA, developing "a stable, strong, and diversified economy which meets the needs of Montana residents both now and in the future while maintaining and improving a clean and healthful environment as required by Article IX, section 1, of the Montana constitution." Accord ^U 17-6-304, MCA. Section 17-6-309(4), MCA, further provides that, "[i]n deciding which of several investments of equal or comparable security and return are to be made when sufficient funds are not available to fund all possible investments, the board shall give preference to the business investments" which, inter alia, "maintain and improve a clean and healthful environment, with emphasis on energy efficiency." The Board's independent obligation under the Investment Act to consider the environmental effects of the use of monies from the investment fund, therefore, is not only entirely complementary with application of MEPA, but is also directly facilitated by compliance with it.

Nonetheless, the mere applicability of MEPA generally to the Board does not determine whether decisions to enter into loan participation agreements constitute "major actions of state government" and are consequently subject to the environmental impact statement requirements in section 75-1-201(1)(b)(iii), MCA. In answering that question, the Montana Supreme Court has made it clear that I must be guided by decisions applying the National Environmental Policy Act (NEPA), 42 U.S.C. ^U^U 4321-4347. See Kedillak, 184 Mont. at 135-37, 602 P.2d at 152-53 (relying upon federal interpretations of NEPA in construing MEPA); 42 Op. Att'y Gen. No. 82 (1988), slip op. at 3. The term "major Federal action," as used in section 102 of NEPA, 42 U.S.C. ^U 4332, has been

interpreted to include most forms of direct or indirect assistance to otherwise private activity. E.g., 40 C.F.R. ^U 1508.18(a) (1988) (federal actions include "projects and programs entirely or partly financed" by government); Proette v. Dent, 484 F.2d 1146 (2d Cir. 1973) (loan to finance private company's construction costs); San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973) (grant to community redevelopment agency); Wilson v. Lynn, 372 F. Supp. 834 (D. Mass. 1974) (mortgage guaranty insurance to secure loan made by financial institution to private developer); see generally D. Mandelker, NEPA Law and Litigation ^U 8.17 (1984) ("In most cases in which a federal agency makes a direct categorical grant for a nonfederal project, the use of federal funds for the project is sufficient to bring it under NEPA. The courts reach the same result when the federal agency makes a loan to a nonfederal entity or makes federal mortgage insurance available"). Such financial assistance will be deemed major federal action for environmental impact statement purposes when "it enable[s] a private party to act so as to significantly affect the environment." South Dakota v. Andrus, 614 F.2d 1190, 1194 (8th Cir. 1980). Thus, "[m]ost courts agree that significant federal funding turns what would otherwise be a local project into a major federal action." Alaska v. Andrus, 591 F.2d 537, 540 (9th Cir. 1978); accord National Association for Advancement of Colored People v. Medical Center, Inc., 584 F.2d 619, 634 (3d Cir. 1978).

The prohibition of loans to individual borrowers in section 3(3) of Initiative No. 95 and section 17-6-310, MCA, is presumably intended to remove the Board from the process of directly soliciting or administering those loans and to ensure active involvement of financial institutions in any extension of credit. The loan participation provisions of the Investment Act accordingly are aimed at fostering development of a credit market, financed from both private and governmental sources, to encourage in-state business growth; i.e., the Investment Act envisions a tripartite functional relationship between the Board, the lending institution and the borrower, where the Board acts to facilitate private financing of selected projects by the infusion of state monies at commercially favorable interest rates. Singularly reflective of this tripartite relationship is the application form used in the Board's loan participation decisionmaking. The form consists of two parts, the first of which must be completed by the private borrower and the second by the financial institution originating the loan. The borrower is required to "[i]nclude both a physical description of the project and a description of the uses of the project" and, under a section designated "Preferences," to describe "any potential environmental impacts occurring as a result of the proposed project[] and [to] specify any environmental permits that will be necessary." The form thereby mirrors the Investment Act's directive that the Board not only consider the environmental impact of projects which are proposed to be financed through loan participation agreements but also give preference under certain conditions to those projects which are environmentally beneficial. Consequently, while proceeds from a loan participation agreement do not constitute a direct loan from the Board to the private borrower, they are nonetheless used to facilitate financing of particular projects, or to "enable" the initiation of those projects, the purposes of which the Board wishes to advance.

It is therefore clear that loan participation agreements constitute a mechanism whereby the State, through the Board, seeks to encourage development of carefully selected private projects. The device used to achieve this result is purchase of a portion of a loan between a lending institution and its private borrower. The Board's financial commitment under these circumstances directly enables, and thereby substantially benefits, the borrower's activity. In light of the indisputable applicability of MEPA generally to the Board and the decisional or other authority discussed above construing the term "major Federal action" in NEPA, a determination to enter into a loan participation agreement must be deemed a "major action[] of state government" under section 75-1-201(1)(b)(iii), MCA.

My conclusion that decisions to enter into loan participation agreements constitute "major actions of state government" should not be viewed as mandating preparation of environmental impact statements before entry into all such agreements, since the requirements of section 75-1-201(1)(b)(iii), MCA, apply only where the involved project may "significantly affect the quality of the human environment." The Board's attention is directed to the pattern rules adopted by other state agencies to discharge their responsibilities under MEPA. E.g., ^U^U 8.2.301 to 8.2.326, ARM (Department of Commerce). These regulations contain substantial procedural flexibility when conducting environmental assessments or, if appropriate, preparing environmental impact statements. The Board may wish to consider adoption of comparable regulations to assist in efficiently discharging its statutory obligations under the Investment Act and MEPA.

Finally, my holding should also not be construed as limiting in any way the Board's substantive decisionmaking power with respect to the propriety of a particular loan participation agreement. The requirements of MEPA, including those in section 75-1-201(1)(b)(iii), MCA, are procedural in nature and designed only to ensure that an agency, to the fullest extent possible, takes otherwise authorized action with reasonably complete understanding of its environmental consequences. See Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1846 (1989) ("[A]lthough [NEPA] procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. ... If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs").

THEREFORE, IT IS MY OPINION:

The Montana Board of Investments must comply with the environmental impact statement requirements of the Montana Environmental Policy Act when the Board considers whether to enter into a loan participation agreement where the underlying project benefiting from the agreement may significantly affect the quality of the human environment.

Sincerely,

MARC RACICOT
Attorney General

Bibliography

Bibliography

Ankersen, Tom. 1986. Cumulative Impacts in Florida Environmental Decisionmaking. The Florida Bar Journal. March, 1986.

Bureau of Land Management. Undated. Approached to Successful Training.

California Office of Planning and Research. 1984. CEQA: The California Environmental Quality Act Law and Guidelines.

CEQ Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 C.F.R., Parts 1500-1508 (1986).

Creighton, James, L. 1981. The Public Involvement Manual. Abt Books. Cambridge.

Irwin, Frances, and B. Rodes. 1992. Making Decisions on Cumulative Environmental Impacts: A Conceptual Framework. World Wildlife Fund.

Howell, Robert, et al. 1987. Designing a Citizen Involvement Program: A Guidebook for Involving Citizens in the Resolution of Environmental Issues. Western Rural Development Center, Oregon State Univ. Corvallis.

Jensen, Jerome, et al. Undated. The SEQR Handbook. New York Department of Environmental Conservation.

Mandelker, Daniel. 1984. NEPA Law and Litigation: The National Environmental Policy Act. Callaghan & Company. Wilmette, IL.

Montana Department of State Lands, Forestry Division. 1992. Applying MEPA to Forest Management Activities.

Moore, Craig, and R. Smardon. 1975. Designing a Control System for Administering MEPA: The Massachusetts Environmental Policy Act. Institute for Man and Environment, University of Massachusetts: Amherst.

Shipley Associates. 1990. A Writing Process for NEPA.

Shipley associates. 1990. Applying the NEPA Process.

U.S. Department of Agriculture, Forest Service. Undated. Forest Plan Implementation: Course 1900-01 Handbook.

U.S. Department of Agriculture, Forest Service. Undated. Our Approach to Effects Analysis.

Washington Department of Ecology. 1988. SEPA Handbook.

MEPA Newsletter Updates

Montana Environmental Policy Act

Part 1

General Provisions

Part Cross-References
Duty to notify weed management district when proposed project will disturb land, 7-22-2152.

75-1-101. Short title. Parts 1 through 3 may be cited as the "Montana Environmental Policy Act".
History: En. Sec. 1, Ch. 238, L. 1971; R.C.M. 1947, 69-6501.

Cross-References
State policy of consistency and continuity in the adoption and application of environmental rules, 90-1-101.

75-1-102. Purpose. The purpose of parts 1 through 3 is to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council.
History: En. Sec. 2, Ch. 238, L. 1971; R.C.M. 1947, 69-6502.

Cross-References
Right to clean and healthful environment, Art. II, sec. 3, Mont. Const.
Duty to maintain clean and healthful environment, Art. IX, sec.1, Mont. Const.
Department of Public Service Regulation, 2-15-2601.

75-1-103. Policy. (1) The legislature, recognizing the profound impact of human activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, recognizing the critical importance of restoring and maintaining environmental quality to the overall welfare and human development, and further recognizing that governmental regulation may unnecessarily restrict the use and enjoyment of private property, declares that

it is the continuing policy of the state of Montana, in cooperation with the federal government, local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which humans and nature can coexist in productive harmony, to recognize the right to use and enjoy private property free of undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans.

(2) In order to carry out the policy set forth in parts 1 through 3, it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may:

(a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) ensure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) protect the right to use and enjoy private property free of undue government regulation;

(e) preserve important historic, cultural, and natural aspects of our unique heritage and maintain, wherever possible, an environment that supports diversity and variety of individual choice;

(f) achieve a balance between population and resource use that will permit high standards of living and a wide sharing of life's amenities; and

(g) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person is entitled to a healthful environment, that each person is entitled to use and enjoy that person's private property free of undue government regulation, and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

History: En. Sec. 3, Ch. 238, L. 1971; R.C.M. 1947, 69-6503.

Cross-References

Right to clean and healthful environment, Art.II, sec. 3, Mont. Const.

Duty to maintain a clean and healthful environment, Art. IX, sec.1, Mont. Const.

Comments of historic preservation officer, 22-3-433

Renewable resource development, Title 90, ch.2.

75-1-104. Specific statutory obligations unimpaired. Nothing in 75-1-103 or 75-1-201 shall in any way affect the specific

statutory obligations of any agency of the state to:

(1) comply with criteria or standards of environmental quality;

(2) coordinate or consult with any other state or federal agency; or

(3) act or refrain from acting contingent upon the recommendations or certification of any other state or federal agency.

History: En. Sec. 6, Ch. 238, L. 1971; R.C.M. 1947, 69-6506.

75-1-105. Policies and goals supplementary. The policies and goals set forth in parts 1 through 3 are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state.

History: En. Sec. 7, Ch. 238, L. 1971; R.C.M. 1947, 69-6507

75-1-106. Private property protection -- ongoing programs of state government. Nothing in Parts 1 through 3 expands or diminishes private property protection afforded in the U.S. or Montana constitutions. Nothing in Parts 1 through 3 may be construed to preclude ongoing programs of state government pending the completion of any statements that may be required by [sections 1 through 3].

History: 1995 Session Laws

Part 2

Environmental Impact Statements

75-1-201. General directions - environmental impact statements.

(1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) all agencies of the state, except the legislature and except as provided in subsection (2), shall:

(i) use a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the environment;

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property, as provided in subsection (1)(b)(iv)(d);

(iv) include in every recommendation or report on proposals for projects, programs, legislation, and other major actions of

state government significantly affecting the quality of the human environment, a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects that cannot be avoided should the proposal be implemented;

(C) alternatives to the proposed action;

(D) any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this subsection (1)(b)(iv)(d) need not be prepared if the proposed action does not involve the regulation of private property.

(E) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and

(F) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented;

(v) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;

(vi) recognize the national and long-range character of environmental problems and, when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of the world environment;

(vii) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(viii) initiate and use ecological information in the planning and development of resource-oriented projects; and

(ix) assist the environmental quality council established by 5-16-101; and

(c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal, and local agencies that are authorized to develop and enforce environmental standards must be made available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

(3) In any action challenging or seeking review of an

agency's determination that a statement pursuant to subsection (1)(b)(iii) is not required, the burden of proof is on the person challenging the decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.

History: En. Sec. 4, Ch. 238, L. 1971; R.C.M. 1947, 69-6504; amd. Sec. 1, Ch. 391, L. 1979; amd. Sec. 1, Ch.473, L. 1987; amd. Sec. 1, Ch. 566, L. 1989.

Compiler's Comments

1989 Amendment: In (3)(a) and (3)(b) substituted "December 31, 1989" for "June 30, 1989"; and inserted (3)(d) relating to reporting requirements concerning programmatic environmental statements not yet adopted.

Cross-References

Citizens' right to participate satisfied if environmental impact statement filed, 2-3-104.

Statement to contain information regarding heritage properties and paleontological remains, 22-3-433.

Public Service Commission, Title 69, ch. 1, part 1.

Statement under lakeshore protection provisions required, 75-7-213.

Impact statement for facility siting, 75-20-211.

Fees for impact statements concerning water permits, 85-2-124.

Energy emergency provisions -- exclusion, 90-4-310.

75-1-202. Agency rules to prescribe fees. Each agency of state government charged with the responsibility of issuing a lease, permit, contract, license, or certificate under any provision of state law may adopt rules prescribing fees which shall be paid by a person, corporation, partnership, firm, association, or other private entity when an application for a lease, permit, contract, license, or certificate will require an agency to compile an environmental impact statement as prescribed by 75-1-201. An agency must determine within 30 days after a completed application is filed whether it will be necessary to compile an environmental impact statement and assess a fee as prescribed by this part. The fee assessed under this part shall be used only to gather data and information necessary to compile an environmental impact statement as defined in parts 1 through 3. No fee may be assessed if an agency intends only to file a negative declaration stating that the proposed project will not have a significant impact on the human environment.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(1).

Cross-References

Fees authorized for environmental review of subdivision plats, 76-4-105.

Fees in connection with environmental impact statement required before issuing permits

to appropriate water, 85-2-124.

75-1-203. Fee schedule -- maximums. (1) In prescribing fees to be assessed against applicants for a lease, permit, contract, license, or certificate as specified in 75-1-202, an agency may adopt a fee schedule which may be adjusted depending upon the size and complexity of the proposed project. No fee may be assessed unless the application for a lease, permit, contract, license, or certificate will result in the agency incurring expenses in excess of $2,500 to compile an environmental impact statement.

(2) The maximum fee that may be imposed by an agency shall not exceed 2% of any estimated cost up to $1 million, plus 1% of any estimated cost over $1 million and up to $20 million, plus 1/2 of 1% of any estimated cost over $20 million and up to $100 million, plus 1/4 of 1% of any estimated cost over $100 million and up to $300 million, plus 1/8 of 1% of any estimated cost in excess of $300 million.

(3) If an application consists of two or more facilities, the filing fee shall be based on the total estimated cost of the combined facilities. The estimated cost shall be determined by the agency and the applicant at the time the application is filed.

(4) Each agency shall review and revise its rules imposing fees as authorized by this part at least every 2 years. Furthermore, each agency shall provide the legislature with a complete report on the fees collected prior to the time that a request for an appropriation is made to the legislature.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(2), (7).

75-1-204. Application of administrative procedure act. In adopting rules prescribing fees as authorized by this part, an agency shall comply with the provisions of the Montana Administrative Procedure Act.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(4).

Cross-References

Montana Administrative Procedure Act -- adoption and publication of rules, Title 2, ch. 4, part 3.

75-1-205. Use of fees. All fees collected under this part shall be deposited in the state special revenue fund as provided in 17-2-102. All fees paid pursuant to this part shall be used as herein provided. Upon completion of the necessary work, each agency will make an accounting to the applicant of the funds expended and refund all unexpended funds without interest.

History: En.69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(5); amd. Sec. 1, Ch. 277, L. 1983.

75-1-206. Multiple applications or combined facility. In cases where a combined facility proposed by an applicant requires action by more than one agency or multiple applications for the same facility, the governor shall designate a lead agency to

prescribed by law for taking depositions in civil actions in the district court. In case of disobedience on the part of any person to comply with any subpoena issued on behalf of the council or any committee thereof or of the refusal of any witness to testify on any matters regarding which he may be lawfully interrogated, it shall be the duty of the district court of any county or the judge thereof, on application of the council, to compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such court on a refusal to testify therein.

History: En. Sec. 16, Ch. 238, L. 1971; R.C.M. 1947, 69-6516.

Cross-References

Warrant of attachment or commitment for contempt, 3-1-513.

Depositions upon oral examinations, Rules 30(a) through 30(g), 31(a) through 31(c), M.R.Civ.P. (see Title 25, ch.20).

Subpoena - disobedience, 26-2-104 through 26-2-107.

Criminal contempt, 45-7-309.

75-1-313. Consultation with other groups -- utilization of services. In exercising its powers, functions, and duties under parts 1 through 3, the council shall:

(1) consult with such representatives of science, industry, agriculture, labor, conservation organizations, educational institutions, local governments, and other groups as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations and individuals in order that duplication of effort and expense may be avoided, thus assuring that the council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

History: En. Sec. 17, Ch. 238, L. 1971; R.C.M. 1947, 69-6517.

75-1-314 through 75-1-320 reserved.

75-1-323. Staff for environmental quality council. The legislative services division shall provide sufficient and appropriate support to the environmental quality council in order that it may carry out its statutory duties, within the limitations of legislative appropriations. The environmental quality council staff is a principal subdivision within the legislative services division. There is within the legislative services division a legislative environmental analyst. The legislative environmental analyst is the primary staff person for the environmental quality council and shall supervise staff assigned to the environmental quality council. The environmental quality council shall select the legislative environmental analyst with the concurrence of the legislative council.

History: En. Sec.12, Ch. 238, L. 1971; R.C.M. 1947, 69-6512.

75-1-324. Duties of environmental quality council. The environmental quality council shall:

(1) gather timely and authoritative information concerning the conditions and trends in the quality of the environment, both current and prospective, analyze and interpret the information for the purpose of determining whether the conditions and trends are interfering or are likely to interfere with the achievement of the policy set forth in 75-1-103, and compile and submit to the governor and the legislature studies relating to the conditions and trends;

(2) review and appraise the various programs and activities of the state agencies, in the light of the policy set forth in 75-1-103, for the purpose of determining the extent to which the programs and activities are contributing to the achievement of the policy and make recommendations to the governor and the legislature with respect to the policy;

(3) develop and recommend to the governor and the legislature state policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the state;

(4) conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(5) document and define changes in the natural environment, including the plant and animal systems, and accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(6) make and furnish studies, reports on studies, and recommendations with respect to matters of policy and legislation as the legislature requests;

(7) analyze legislative proposals in clearly environmental areas and in other fields where legislation might have environmental consequences and assist in preparation of reports for use by legislative committees, administrative agencies, and the public;

(8) consult with and assist legislators who are preparing environmental legislation to clarify any deficiencies or potential conflicts with an overall ecologic plan;

(9) review and evaluate operating programs in the environmental field in the several agencies to identify actual or potential conflicts, both among the activities and with a general ecologic perspective, and suggest legislation to remedy the situations;

History: En. Sec. 14, Ch. 238, L. 1971; R.C.M. 1947, 69-6514.

MEPA Handbook

Public Particpation Techniques Handout

Appendix B

Citizen Involvement Techniques

A wide variety of specific techniques exist to facilitate participation during a citizen involvement program. In this section, several citizen involvement techniques are categorized according to their three main objectives: information dissemination and issue understanding, citizen/government or industry interaction in planning, and decision making.

Information-dissemination and issue-understanding techniques are used to facilitate answering questions that are presented by community residents and representatives of the private sector and government agencies that have interests in a proposed action. Issue understanding is emphasized to stress the importance of communicating complex and technical information in ways which can be easily understood, thereby minimizing confusion that can lead to conflict. Information-dissemination and issue-understanding techniques should be tailored to the needs of local communities and should be as practical as possible, for without an efficient means of exchanging information, planning can become one-sided, and decision-making can become biased. Some of these techniques offer the opportunity for groups with diverse interests to become acquainted in an informal setting—a kind of "breaking-the-ice."

Citizen/government or industry interaction techniques involve direct communication among the major interest groups, and these techniques tend to highlight the perspectives of each party and the degree of mutual agreement or dissent. Here, communication is the primary medium for assessing alternatives and for reaching partial consensus. Such an exchange can result in a better understanding among participants of why differing views are expressed.

After a sufficient amount of review and discussion has occurred, decision-making techniques become important to the successful completion of a citizen involvement program. These techniques draw upon a citizen group's experience, knowledge, and organizational structure, and focus the members' attention upon the resolution of a particular problem or the attainment of a key objective. Decision-making techniques reveal the ability of a community to respond to outside challenges. Techniques that allow a community to organize and govern itself, will significantly influence government and industry representatives to accept collaborative planning.

The following techniques are organized to provide easy reference. Each technique is briefly discussed and its advantages and disadvantages are highlighted. After this material, a selected bibliography is provided for persons needing further details about specific techniques.

Information Dissemination and Issue Understanding

Brainstorming: The citizen involvement program coordinator conducts a meeting in which comments are solicited about a specific topic. Another person records the comments on butcher paper, a blackboard, or an overhead projector, so that the comments are clearly seen and acknowledged by all participants. The comments are not evaluated but are sorted into topical categories. The participants are then split into groups, and each group evaluates a specific category.

Advantages	Disadvantages
• Is a fairly quick and easy means to inventory major issues, public concern, and feelings.	• Primarily a one-way interaction, with public expressing views.
• Provides a setting where participation in future activities may be announced and discussed.	• Can result in a confrontation situation.
	• Participants may not be representative.

Breakfast Meeting: This is a regularly scheduled and centrally located meeting designed for informal dialogue between the project developers, facilitators, and the public. Listening to public concerns is the primary role of the developers and facilitators. Comments may be recorded, summarized, and sent to other participants.

Advantages	Disadvantages
• Provides an informal atmosphere.	• May limit low-income people's attendance.
• Helps agency/industry keep a "pulse" on public concerns and feelings.	• Noises and dining activities may hinder information collection.
	• Primarily a one-way interaction, with public expressing views.
	• The number of participants must be kept small.

Direct Mailing: Brochures or "mini-reports" can be mailed directly to citizens who live in the subject community. All brochures and reports should contain a common package of information which outlines specific technical considerations, possible alternatives, and other pertinent factors, and also provides the names, addresses, and telephone numbers of individuals, organizations, or agencies who can provide further information.

Advantages	Disadvantages
• Distributes information to a large number of people—an effective and widespread means of communication.	• A one-way technique; that is, agency and technical experts are sending information to the community but are not receiving any feedback.
	• Offers limited citizen/agency or industry contact.
	• Requires extensive preparation, and can be moderately expensive.

Fast Forum Technique: The fast forum technique involves a series of brief surveys that collect citizen feedback on specific ideas or actions. It asks for only "yes" or "no" answers to concise questions. The surveys can be distributed by local organizations or they can be mailed directly. The surveys are periodically distributed throughout the community during the policy-making process in order to solicit immediate public response.

Advantages	Disadvantages
• Allows decision-makers to "keep their fingers on the pulse" of public opinion.	• Is subject to short-term citizen perceptions and doesn't necessarily represent the collective view of the community.

	• Individuals may become apathetic about responding to several surveys and give false responses or not return the surveys. • Is strictly a one-way method to collect information.

Field Trip: Either buses are provided or carpools are arranged for transportation to the area where the proposed project is to be conducted. An on site examination is then conducted, where the guide, staff specialists, and outside experts provide information about the proposed location, activities, and possible effects, and they answer any questions that may be raised.

Advantages	Disadvantages
• Provides firsthand knowledge of site: geology, flora and fauna, etc. etc. • Printed materials related to the site and proposed action can be distributed. • Provides an informal setting for discussion.	• Requires much planning for advance notice, transportation, accessibility, etc. • Weather may interfere with the trip. • Physical condition and capabilities of participants needs to be taken into account. • A number of experts may need to be present to answer questions. • Citizen/agency or industry interaction is minimal. • Insects, noises, and other factors may inhibit group interaction.

Hotlines: Hotlines provide a ready source of information which citizens can obtain at their convenience. Government agencies or community organizations can hire hotline personnel to answer questions, direct individuals to the proper sources, and register names for specific mailing lists.

Advantages	Disadvantages
• Allow for quick information dissemination. • Can serve as a means of receiving citizen input.	• Primarily a one-way information exchange technique. • Provide limited citizen/agency or industry contact. • Can be expensive to operate.

Information Centers: Such centers are well-publicized spots where public information can be easily obtained. They can be formal centers, established exclusively to disseminate information, or they can be informal areas where citizens normally gather, such as banks, barber shops, taverns, stores, etc.

Advantages	Disadvantages
• Allow quick and easy accessibility to information. • Represent agency's or industry's desire to make information accessible. • Can be staffed by professionals who are capable of giving accurate information or providing correct information sources to the public.	• Provide marginal citizen/agency or industry contact and communication. • Require careful planning and substantial effort. • Can be costly in terms of personnel and informational material expenses. • Can provide misinformation if not staffed by knowledgeable personnel.

Information Seminars: Information seminars bring together, in a face-to-face setting, all interested parties who are affected by potential development. In this relatively informal setting, citizens and government and industry representatives can ask questions, present specific technical information, and freely discuss alternatives and impacts upon the community. Technical advisors and program facilitators should always be present in order to answer questions and moderate discussion.

Advantages	Disadvantages
• Provide a two-way information exchange medium.	• Can become confrontation meetings between opposing

• A high degree of citizen agency contact is achieved. • Problems and alternatives can be freely discussed without the need, or the social and political pressure, to arrive at formal decisions. • The information given helps to build community awareness.	interests, rather than free information-and-discussion settings, unless participant discussion is guided by a neutral moderator.

Informal Group Discussions: Informal group meetings consist of small discussion groups which involve community leaders, general citizens, agency officials, and any combination thereof. Their primary purpose is to present information, analyze community needs, outline community opinions, and discuss ideas for stimulating community awareness of key issues.

Advantages	Disadvantages
• Can begin the initial process of information exchange and community needs assessment among community leaders and agency and industry representatives. • Their informal nature encourages a high degree of intimate citizen/agency or industry contact. • Individuals who would remain silent under more formal conditions express opinions.	• Informal group meetings seldom reflect community-wide representation.

Mass Media: This technique is the planned and systematic use of major media, such as news releases, articles in local publications, newsletters, brochures, pamphlets, paid ads, posters and displays, public service announcements, participation-style radio and television programs, television documentaries, and radio and television talk shows. Using mass media can be one of the most effective ways to spread general information or provide details concerning a particular issue. Agencies can transmit directly pertinent information, and

community organizations can inform citizens of important meeting dates.

Advantages	Disadvantages
• Ensures wide community information coverage. • Enables technical advisors to debate issues and alternatives before a wide audience. • Citizens have the convenience of sitting in their own homes and assessing technical information.	• Requires careful planning, and can be costly. • Is generally a one-way information exchange medium.

On Site Demonstration: Participants are transported to the proposed project area or a similar site and a demonstration of the proposed activities is provided. Information is provided and experts are available to answer questions.

Advantages	Disadvantages
• Provides firsthand knowledge of site: geology, flora and fauna, etc. • Provides information about a specific topic or activity. • Printed materials can be distributed and related to site. • Provides an informal setting for discussion.	• Requires much planning for advance notice, transportation, accessibility, etc. • Weather may interfere with the trip. • Physical condition and capabilities of participants needs to be taken into account. • A badly run demonstration could be a negative influence. • Safety of participants must be provided. • A number of experts may need to be present to answer questions. • Citizen/agency or industry interaction is minimal.

	• Insects, noises, and other factors may inhibit group interaction.

Open House: A well-known public building is used to set up informational displays, maps, photographs, and brochures and handouts are available. Project developers, facilitators, staff specialists, and outside experts are present to provide information, answer questions, and discuss the issues in an informal but potentially in-depth manner.

Advantages	Disadvantages
• Provides an informal, personal citizen/agency or industry contact atmosphere.	• Requires much planning, time, and expense.
• Allows quick and easy access to a large amount of information.	• Requires experts who can answer any questions presented over a long time period.
• The public may attend at their convenience and spend as much time as necessary.	

Surveys: Community-wide surveys can be conducted in many ways and can include a wide variety of questions. Survey questionnaires can be mailed to local citizens or dropped off at their homes; or the organizer can make use of telephone interviews or direct person-to-person interviews.

Advantages	Disadvantages
• Provide a means for monitoring community attitudes, knowledge, and opinions.	• Might require more time and expense than organizers desire.
• Can be relatively inexpensive information-gathering devices.	• If used too often or if requiring a lot of time and expertise to complete, citizens may not respond.
• Individuals selected for the survey can be found by reviewing voter registration lists, telephone directories, etc.	
• Can allow for statistically random sampling, thereby ensuring representative community opinions.	
• Mailed questionnaires can include space for additional comments.	
• Can indicate the degree of community consensus on important issues.	

Task Force: A task force comprises citizen representatives which form a planning or advisory body. After reviewing information about a specific issue or option, the task force recommends a course of action to a decision-making body. Task force representatives should include members of the community from all economic levels and geographic locales.

Advantages	Disadvantages
• Generates greater citizen participation throughout the community, spreading to citizen awareness and citizen expertise.	• Members must understand that they are accountable to a citizen decision-making body.
• Giving task force groups well-defined objectives helps decision-making bodies to assess the alternatives during the planning phase.	• Members must be willing to spend considerable amounts of time in order to accomplish their objective.
• Encourages a creative approach to problem solving.	• Members must be given substantial amounts of information and help from technical experts.

Working Groups: Participants are divided into groups of approximately 6 to 12 members. Each group must have members who represent a variety of views and positions within the affected area. Members act as a communication link to the organization, agency, or group they represent. Each group works with the developers or facilitators throughout a review or planning period. The

first meeting is called by the facilitator who informs the group of what will need to be reviewed, and how their efforts will be utilized. Thereafter the members call the meetings as they deem necessary for the proper investigation of an issue. Facilitators and staff specialists assist in conducting meetings, answering questions, and collecting information. The group is given no decision-making authority.

Advantages	Disadvantages
• Much information can be assimilated and discussed.	• Requires much time and effort by citizen/agency or industry participants.
• A high degree of citizen/agency or industry interaction occurs.	• Members may not be representative of general public.
• Issues can be fully discussed and solutions developed.	• Members must report to their organizations or agencies about information collected and issues discussed.
• Provides an instant feedback to the agency or industry.	• A great deal of information must be available and experts must be present.

Workshops: Workshops are special information review sessions which are open to citizens, government officials, and industry representatives. In an intense educational environment, participants identify and analyze major points of specific topics, issues, or alternatives.

Advantages	Disadvantages
• Are a practical method of introducing new ideas.	• For the best results, workshops should require some participant selectivity, with the result that community representation is not achieved.
• Offer a high degree of citizen/government or industry contact.	• Care must be taken so that workshops do not become manipulative or "co-optive tools" of the government or industry representatives, or other well-informed special interest groups.
• Successful workshops can substantially improve the knowledge, and can mirror the perceptions of all groups involved.	

Citizen/Government or Industry Interaction

Advocacy Planning: Whenever a community decides to follow the course of advocacy planning, attempts to reach a citizen/government or industry consensus are abandoned. Citizen groups may employ a professional advocate, usually a lawyer, who directly confronts government agencies or industry on behalf of the community. The advocate seeks to advance and protect community interests during the policy-making process. Frequently, advocacy planning goes beyond the normal stages of confrontation. When this occurs, citizens abandon all forms of negotiation, and as the ultimate strategy, attempt to wrestle a favorable decision for the community from the courts.

Advantages	Disadvantages
• Brings technical disputes directly to the forefront for public scrutiny.	• Any kind of community/agency or industry consensus is usually destroyed.
• Can check government or industry manipulation.	• Is an expensive form of negotiation for all of the groups participating in the policy-formation process.

Citizen Advisory Committee: The citizen advisory committee is a small group of persons chosen to represent the views of the community-at-large, and it is directed to give government and industry representatives advice concerning policy decisions. Citizens selected for the advisory committee are usually chosen by an agency or industry and then tacitly approved by the community. The advisory committee reviews proposed agency or industry plans, assesses community opinions and attitudes, and then prepares a formal recommendation to government or industry based upon their interpretation of public desires. Their sole claim to power rests upon the influence of citizen recommendations.

Advantages	Disadvantages
• Serves as a liaison between agencies and community.	• Membership is seldom representative.
• Allows government and industry personnel to work directly with a single group of citizen representatives.	• Traditionally has low citizen input, thus making it difficult to obtain wide community support for its recommendations.

	• Individuals who are appointed to the advisory committee must be willing to spend considerable amounts of time on their appointed duties. • Lacks tangible power to influence agencies or industry.

Citizen Assemblies: An area where development is proposed, is divided into several districts, and a citizen representative from each district meets with other district representatives in a citizen assembly. What emerges is an unofficial citizen congress. Representatives are responsible for reviewing technical information, meeting with agency and industry representatives, and determining the best community alternatives.

Advantages	Disadvantages
• Guarantee community-wide representation. • Establish good citizen/agency or industry contact. • Are difficult for agencies or industries to manipulate or co-opt.	• Organizing the citizen assemblies requires a great deal of time and planning. • Citizen representatives are required to devote large amounts of time to their assigned duties.

Community Impact Committee: This group's main responsibility is to determine the probable social and economic impacts of a proposed development upon a community. It conducts public meetings for information exchange and makes recommendations to government leaders, agency officials, and industry representatives. Representation on the community impact committee includes local government leaders, public service personnel, community merchants, a wide range of general citizens, and agency and industry representatives. The community impact committee is an information collector, information disseminator, and advisory board to local government.

Advantages	Disadvantages
• Allows for a high degree of citizen/agency or industry contact, bringing significant interest groups together in a unified governing body.	• Citizens may not be adequately represented. • Is vulnerable to agency or industry manipulation and co-optation.

Community Forum: A community forum can be an information dissemination process, a citizen/agency or industry interaction process, or a combination thereof. At its best, the community forum is the answer to avoiding the pressures and confrontations of a formal public hearing. Like the public hearing, it brings together citizens, agency or industry representatives, and a host of technical experts; but the major difference is that formal testimony is not recorded and documented as being the final public, agency, or industry position. The forum allows direct, but not binding, views to be presented. It is, in a sense, a rehearsal of the formal public hearing, where views will go on record as being the final word. A forum gives all participating groups time to reanalyze their original positions, continue an open dialog, and anticipate the expected results of a formal public hearing.

Advantages	Disadvantages
• Provides excellent citizen/agency or industry contact. • Offers the opportunity for widespread citizen participation. • Tends to limit confrontation politics and ill feelings between active parties.	• Special interest groups can gain control of forum presentations and information, unless a neutral moderator is present.

Community Planning Council: Establishing a community planning council is a long-term commitment to community planning and policy making. It is a formally elected or appointed citizen body that becomes a permanent advisory committee to local government, state and federal agencies, or industry. The council's job is to review agency or industry planning proposals, respond to questions from the public, and recommend appropriate policy decisions.

Advantages	Disadvantages
• Ensures a firm citizen commitment to public participation.	• Is seldom a representative citizen body.

• Creates an ongoing citizen advisory body for government and industry referral.	• Is susceptible to government and industry manipulation and co-optation.

Community-Sponsored Meetings: Community-sponsored meetings are arranged and chaired by leaders of a specific citizen group, local organization, or by local officials. The sponsoring group invites agency and industry representatives or technical experts to the meetings, and establishes the agenda or the priorities of the meetings.

Advantages	Disadvantages
• Give citizens the feeling that the "show" belongs to them and not to the participating agency or industry.	• May be purposely designed to embarrass or discredit agency or industry officials.
• Tend to allow for wide citizen participation.	
• Offer a high degree of citizen/agency or industry contact.	

Lobbying: Lobbying can be conducted in various ways. Citizens may decide to limit lobbying activities to writing letters, to telephoning elected representatives, or to sending petitions or telegrams to pertinent state and federal officials. In order to gain greater influence, citizens may decide to employ a full-time lobbyist who presents, directly, community views to state or federal government legislators. Some lobbying procedures can be utilized along with other citizen involvement techniques without endangering citizen/agency or industry communication.

Advantages	Disadvantages
• Some procedures, such as the sending of telegrams to representatives, require little citizen effort or time.	• Some procedures, such as the employing of a full-time lobbyist, are expensive.
• Is a traditional citizen right.	• Does not always provide government officials with a "balanced" view of issues.
• Citizens give greater political impact to their views through lobbying measures.	

Ombudsperson: The ombudsperson serves as an independent, impartial third party who mediates citizen/agency or industry redresses, complaints, and preferences. The ombudsperson possesses no actual power, but serves to help each interest group arrive at a common viewpoint or consensus. The ombudsperson attempts to identify the positive and negative features of the views which have been presented by citizens, government, and industry representatives, and contribute to mutual understanding among participants.

Advantages	Disadvantages
• Can improve attitudes and relations among citizens, agency officials, and industry representatives.	• The power or influence of the ombudsperson depends upon the cooperation and goodwill of all of the parties involved.
• May receive information from citizens who are reluctant to discuss such information directly with government or industry representatives.	• Government agency officials or industry representatives may use the ombudsperson in order to avoid direct contact with citizens.
• Can identify specific problems and can, in some cases, recommend alternatives or changes which are agreeable to all of the parties concerned.	

Public Hearings: Public hearings serve to legally document legally public, agency, and industry views toward particular issues. They are required in government decision making at almost all levels of public policy. Here, individuals give testimony of their opinions, or the viewpoints of groups which they represent, about certain projects. Public hearings are open for all individuals and groups to present their views for the official record.

Advantages	Disadvantages
• Formally document citizen/government or industry positions.	• Are seldom conducive to widespread public representation.
	• Usually enhance confrontation and a polarization over issues.

- Are usually dominated by a few individuals or special interest groups.
- Citizens usually give testimony with little interaction or discussion with agency or industry representatives.
- Can increase adverse relationships between citizens, government, and industry representatives.
- Many individuals are embarrassed to ask questions at public hearings.
- When reporting the events of public hearings, the media usually describes only confrontation situations.
- Are usually enacted after a decision on a particular issue has already been reached by government or industry planners.
- There is often just pro forma reactions by government agencies in order to honor the legal mandate of citizen involvement.

Steering Committee: The citizen steering committee is an executive citizen body representing a larger citizen group. Elected by the community-at-large or community representatives, the steering committee directs information dissemination and citizen fact-finding groups, and makes recommendations to government and industry representatives. In order to implement information dissemination and citizen fact-finding, the committee may request special workshops or appoint citizens to specific working groups. The steering committee assesses information, agency or industry planning alternatives, and initiates and chairs citizen/agency or industry meetings.

Advantages	Disadvantages
• The approach allows citizens and government and industry representatives to respond to a single citizen governing body. • Builds strong citizen involvement leadership.	• Membership on the citizen steering committee may not be representative of citizens throughout the community.

Decision-making

Arbitrative Planning: Arbitrative planning is similar to the ombudsperson approach. An individual expert is hired by citizens, government agencies, and industry to serve as a hearing officer to arbitrate among community, agency, and industry in policy planning. The hearing officer evaluates each side of the story in an attempt to offer suitable compromises for all interest groups. Unlike the ombudsperson's authority, the arbitrator's rulings are binding on communities, agencies, and industry.

Advantages	Disadvantages
• Enables an outside, neutral party to make the ultimate decisions which affect the various special interest groups.	• It is sometimes extremely difficult to convince citizens, government, and industry representatives to accept the final judgment of an outside authority. • Can stimulate citizen/agency or industry communication but often in a confrontation setting.

Charrette: A charrette is an intense planning session among all of the interest groups involved in the policy-planning process. Charrette participants meet with the idea in mind that they will continue discussion and negotiation until some form of resolution or agreement can be achieved. A charrette can continue for several days or several weeks depending upon how long it takes to reach specific decisions.

Advantages	Disadvantages
• Participants share a mutal commitment to pursue negotiation and discussion until a clear-cut course of action is agreed upon.	• Requires a great deal of planning and can be costly to conduct.
• Is probably the swiftest means for citizens, government, and industry representatives to make agreements.	• Because a charrette requires large segments of the participants' time, it may not include some key community leaders.
	• Usually does not provide community-wide representation.

Citizen Lawsuit: The citizen-initiated lawsuit demonstrates an unwillingness of citizens and government or industry representatives to negotiate and discuss policy plans. In effect, it takes the decision-making process out of the hands of citizens, and government or industry representatives, and opens it up to judicial review. Sometimes, citizen lawsuits are initiated after a substantial amount of negotiation has already occurred. At this point, citizens feel that government or industry representatives are not offering them the best options available. Hoping to gain a more responsive forum, citizens seek redress through the courts.

Advantages	Disadvantages
• Offers a means for citizens to challenge the decisions made by government or industry representatives which they feel are not in the public interest.	• Can be initiated by special interest groups within the larger community constituency, therefore, not reflecting community-wide opinion.
• Definitely leads to a decision —a decision thought to stem from a responsible governing body.	• Quickly brings to an end constructive citizen/agency or industry negotiation and discussion—cooperative communication breaks down.

Citizen Review Board: The citizen review board exhibits all of the characteristics of the citizen advisory council except that it wields the ultimate decision-making authority. Like the advisory board, the review board may either be elected directly by citizens, appointed by government or industry representatives, or any combination thereof. The review board analyzes technical information and proposals which have been brought forth by citizens, government agencies, and industry, and then gives a formal recommendation for future actions. The ultimate decisions reached by the review board are binding on citizens, government agencies, and industry.

Advantages	Disadvantages
• Gives formidable power to citizens.	• Does not ensure community representation.
• Citizens in the community are more likely to accept and abide by the decisions which have been made by a citizen review board than those decisions which government agencies and industry attempt to enforce.	• It is extremely difficult for government and industry representatives to accept willingly the recommendations of a citizen review board.

Citizen Representation—Public Policy-Making Body: In this technique, citizens are asked by government or industry representatives to sit on a public policy-making body. Comprised of government officials and/or industry officials and citizen representatives, this group reviews pertinent information, solicits community opinion, and formulates policy.

Advantages	Disadvantages
• Citizens may be more receptive to decisions which have been generated by a formal planning body that includes citizen representatives.	• The appointment of citizen representatives to a policy-making board is sometimes merely a symbolic act or tokenism on the part of government agencies or industry.
• Allows for at least a marginal amount of citizen/agency or industry interaction.	• Does not ensure community-wide representation.
	• Citizens on the public policy-making board are susceptible to manipulation or co-optation by government or industry representatives.

Fish-Bowl Planning: Fish-bowl planning is used to open the planning process to a wide variety of interests. Alternatives to a course of action that have been generated by citizen/agency discussion are described in a series of public information bulletins. Citizens can express their views in space which has been designated for this purpose in the bulletins, and mail the bulletins back to the distributing source. These citizen comments are reiterated and again distributed to the general public for interpretation and analysis. In this way, the agency, planner, or industry that proposes certain courses of action can determine the most controversial aspects of the plan. Fish-bowl planning is, of course, only effective when it is carried out together with information-dissemination techniques.

Advantages	Disadvantages
• Generates widespread citizen participation.	• Citizens need time to view necessary technical information prior to the fish-bowl planning process.
• Allows the general public to react, redefine, and, in some cases, enthusiastically support final decisions.	• Fish-bowl planning does not necessarily guarantee that the wishes of the citizen majority, though perhaps stated explicitly, will be followed.
• Definitely provides government and industry representatives with a detailed outline of public consensus.	

Local Referendum: The citizen referendum is an extremely democratic technique, whereby proposed planning measures are directly brought before the voting citizenry for acceptance or disapproval by a balloting process. The local referendum procedure is identical to the state referendum procedure, except that local referendum is on a community scale. Citizens can vote at their normal polling stations.

Advantages	Disadvantages
• Guarantees community-wide representation.	• Fosters little citizen/agency or industry contact, unless it is joined with citizen/agency or industry interaction techniques.
• Citizens are likely to support willingly any action that they have approved at the ballot box.	• Requires that citizens be well-informed.
	• The views of a narrow majority may be implemented, while minorities may find their opinions foreclosed.

Media-Based Issue Balloting: In this process, the mass media is used to present and discuss issues, and the public is invited to vote on their preferred alternatives. The choice of the media base is up to the discretion of citizens, government, and industry representatives. For example, local television stations can present panel discussions, and then have citizens call in their views or their votes; or to give the audience more reaction time, ballots can be issued through newspapers.

Advantages	Disadvantages
• Is conducive to widespread citizen representation.	• Does not enhance direct citizen/agency or industry communication and interaction.
• Can be used by government and industry representatives in order to assess citizen consensus.	• Does not guarantee that citizen viewpoints will be upheld by government and industry representatives, even if a clear consensus is apparent.

Policy Delphi: The policy delphi is a series of questioning sessions directed toward an appointed panel which represents various community interests as well as involved government agencies and industry. The questioning can take place either in meetings or in a series of mailed questionnaires. In the first-round questionnaire, respondents are asked to list their preferences, pro or con, on the alternatives outlined. The second-round questionnaire begins by presenting opinions, viewpoints, and alternatives which were selected by the first-round process. Respondents are then asked to list their degree of confidence in, agreement with, and acceptance of the results of the first questionnaire. This evaluation process is carried out through several rounds of questionnaires until consensus on key issues and priorities begins to emerge. During the final rounds of the questionnaires, it will become apparent where consensus lies on specific issues, and the degree of support for different positions. To a certain extent, the policy delphi resembles fish-bowl planning, except that the number of respondents is reduced to a select panel.

Advantages	Disadvantages
• One asset is that respondents are requested to state their reasons for their positions. These reasons are, in turn, viewed by other respondents and evaluated. After a number of questioning rounds, respondents may change their original positions if they become convinced that their original justifications are no longer viable. • Allows time for respondents to assess the material they are evaluating. • Restricts the impact of small, special interest groups.	• Does not provide a representative sample of community opinion. • Requires that respondents are well-informed. • Requires extensive coordination by an experienced moderator.

State Initiative Vote: A state's entire voting citizenry goes to the polls and offers its collective viewpoint about an alternative.

Advantages	Disadvantages
• Presents the views of a large, regional constituency. • Allows citizens on a regional basis to vote on which alternatives should become law.	• Regional attitudes may overshadow local community desires. • Citizens may not necessarily understand the issues they are expected to evaluate and to make final decisions upon.

Selected References on Citizen Involvement Techniques

Alterman, R. 1982 "Planning for Public Participation: The Design of Implementable Strategies." *Environment & Planning* 9 (3):295-313.

Arnstein, Sherry R. 1977 "A Ladder of Citizen Participation." In Patricia Marshall (ed.), *Citizen Participation Certification for Community Development*. Washington, D.C.: National Association of Housing and Redevelopment Officials.

Burke, E. M. 1968 "Citizen Participation Strategies." *Journal of the American Institute of Planners* 34 (5):287-294.

Butler, Lorna Michael and Robert E. Howell 1980 *Coping with Growth: Community Needs Assessment Techniques*. Corvallis, Oregon: Western Rural Development Center, Oregon State University, WREP 44, October.

Glass, J. T. 1979 "Citizen Participation Planning: The Relationship Between Objectives and Techniques." *American Planning Association Journal* 45 (2):180-189.

Institute for Participatory Planning 1978 *Citizen Participation Handbook for Public Officials and Other Professionals Serving the Public*. Laramie, Wyoming: Institute for Participatory Planning.

Johnson, Lawrence and Associates 1978 *Citizen Participation in Community Development: A Catalog of Local Approaches*. Washington, D.C.: Lawrence Johnson and Associates. Prepared for the United States Department of Housing and Urban Development.

Ministry of Forests, Province of British Columbia 1981 *Public Involvement Handbook*. Victoria, British Columbia: B.C. Ministry of Forests.

Moyer, Harriet, et al. 1980 *Asking, Listening and Telling: Citizen Participation, Handbook and Summary*. Madison, Wisconsin: Extension Service, University of Wisconsin.

Nix, H. L. and P. L. Dressel 1978 "Structure and Process for Citizen Participation." *Journal of the Community Development Society of America* 9 (1):97-110.

Northeastern Illinois Planning Commission 1977 "The Delphi Process and the Nominal Group Technique." In Patricia Marshall (ed.), *Citizen Participation Certification for Community Development*. Washington, D.C.: National Association of Housing and Redevelopment Officials.

STATE OF MONTANA
ENVIRONMENTAL QUALITY COUNCIL
STATE CAPITOL
PO BOX 201704
HELENA, MONTANA 59620-1704
(406) 444-3742

Deborah B. Schmidt, Executive Director

GOV. MARC RACICOT
Designated Representative
Glenn Marx

HOUSE MEMBERS
Vicki Cocchierella, Vice Chair
Dick Knox
Scott Orr
William "Bill" Ryan
Debbie Shea
Bill Tash

SENATE MEMBERS
Vivian Brooke
William Crismore
Steve Doherty
Lorents Grosfield
Kenneth Mesaros
Jeff Weldon

PUBLIC MEMBERS
Jerry Noble, Chair
Jerry Sorensen
Jeanne-Marie Souvigney
Gregory Tollefson

June 1, 1995

TO: Council Members

FROM: Todd Everts, EQC Staff

RE: A Summary of the 1995 MEPA Legislative Changes

The Montana Environmental Policy Act (MEPA) was not immune to the numerous environmental and natural resources changes that swept through the 1995 Legislature. However, the original purposes of the Act remain intact. MEPA requires state agencies to think before they act and requires that the public be informed of and participate in the decision-making process. Having said that, the 1995 Legislature did make a number of substantive changes to the MEPA process that include: limiting the scope of MEPA's application; clarifying that economic analysis conducted pursuant to MEPA must include an analysis of regulatory impacts on private property; elevating the burden of proof for parties challenging an agency's decision not to conduct an environmental impact statement; and ensuring that ongoing programs of state government continue pending the completion of any statement that may be required by MEPA.

Scope of MEPA's Application

The 1995 Legislature expanded the list of those actions that are exempt from MEPA review. For example, Senate Bill 288 exempts the legislature and legislative activities from MEPA review. House Bill 274 exempts certain emergency and limited access opportunity timber sales on state forest lands from MEPA review. The 1995 Legislature, with the passage of Senate Bill 347, also potentially limited MEPA's impact analysis for negotiated reciprocal access agreements involving isolated tracts of state forest land. Senate Bill 347 specifically notes that the Department of State Lands "is not required to analyze or consider the potential impacts of activities that may occur on private or federal lands in conjunction with or as a result of granting access".

Evaluation of Regulatory Impacts on Private Property

Private property rights took center stage during the 1995 Legislative Session. As a result, MEPA was substantively amended by Senate Bill 231 to incorporate private property right considerations into the MEPA review process. Senate Bill 231 requires that if a proposed state agency action involves the regulation of private property, the agency, in its evaluation of the economic and social impacts of the proposed action, must evaluate the regulatory impacts the action has on private property rights. Furthermore, in evaluating alternatives to the proposed action, state agencies are required to analyzed alternatives that reduce, minimize, or eliminate the regulation of private property rights.

Burden of Proof

Depending on the jurisdiction, Senate Bill 288 clarifies and/or elevates the burden proof to clear and convincing evidence for a party challenging an agency's decision not to conduct an EIS. Specifically, a "court may not set aside the agency's decision [a decision not to conduct an EIS] unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law." According to the Sponsor of Senate Bill 288, the elevation of the burden of proof to clear and convincing evidence is designed to weed out frivolous lawsuits.

Ongoing State Programs Pending MEPA Review

Concerns over a lawsuit which threatened the reissuance of grazing leases on the Beaverhead National Forest pending a Forest Service's National Policy Act review was the impetus behind the enactment of new section 4 in Senate Bill 231. Section 4 basically states that nothing in Montana Environmental Policy Act may be construed to preclude ongoing programs of state government pending the completion of any statements that may be required by MEPA. It is unclear whether this section does what it is intended to do.

Legislation Effective Dates:

Senate Bill 288 - Effective October 1, 1995

Senate Bill 231 - Effective October 1, 1995

Senate Bill 274 - Effective October 1, 1995

Senate Bill 347 - Effective October 1, 1995

SENATE BILL NO. 231

INTRODUCED BY MESAROS, KNOX, GRINDE, ROSE, BECK, MARSHALL, GREEN, FELAND, SLITER, FUCHS, STOVALL, DEVANEY, WISEMAN, HARGROVE, REHBEIN, MOHL, BAER, HOLLAND, MARTINEZ, TOEWS, BOHARSKI, KASTEN, MERCER, MASOLO, HAYNE, MILLS, L. SMITH, AHNER, HERRON, MILLER, M. HANSON, HERTEL, EMERSON, CRISMORE, BENEDICT, DEVLIN, SWYSGOOD, HARP, KEATING, GROSFIELD, BARNETT, TAYLOR, BERGMAN, SOMERVILLE, DEBRUYCKER, MCKEE, WELLS, DENNY, BRAINARD, FORBES, OHS, CLARK, ANDERSON, TASH, KITZENBERG, CURTISS, T. NELSON, WAGNER, STORY, ELLIS, BROWN, JABS, COLE, TVEIT, HOLDEN, HARDING, JENKINS, AKLESTAD, ESTRADA, S. SMITH, MURDOCK

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE PURPOSE AND POLICY OF THE MONTANA ENVIRONMENTAL POLICY ACT TO INCLUDE PRIVATE PROPERTY RIGHT CONSIDERATIONS AND IMPACTS OF STATE GOVERNMENT ACTIONS; AND AMENDING SECTIONS 75-1-102, 75-1-103, AND 75-1-201, MCA."

STATEMENT OF INTENT

~~It is the intent of the legislature that this legislation serve as a directive to state agencies to implement government actions in a manner that reduces regulatory restrictions placed on private property.~~ Whenever Montana Environmental Policy Act analysis is required, it is the intent of the legislature that ~~any~~ actions ~~be analyzed to ensure that undue government regulation of private property be evaluated and that alternatives that eliminate regulation of private property be implemented when practicable.~~ THAT REGULATE THE USE OF PRIVATE PROPERTY ARE EVALUATED TO ENSURE THAT ALTERNATIVES THAT REDUCE, MINIMIZE OR ELIMINATE REGULATORY RESTRICTIONS ARE CONSIDERED. IT IS NOT THE INTENT OF THE LEGISLATURE TO AFFECT IN ANY MANNER OTHER ECONOMIC OR SOCIAL CONSIDERATIONS OR ANY OTHER ANALYSIS CONDUCTED UNDER THE MONTANA ENVIRONMENTAL POLICY ACT.

It is not the intent of the legislature to diminish or affect in any manner a property owner's rights under nuisance or takings law. Furthermore, it is not the intent of the legislature to affect the law of eminent domain in any manner.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-1-102, MCA, is amended to read:

"**75-1-102. Purpose.** The purpose of parts 1 through 3 is to declare a state policy ~~which~~ that will encourage productive and enjoyable harmony between ~~man~~ humans and ~~his~~ their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts ~~which~~ that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of ~~man~~ humans, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council."

Section 2. Section 75-1-103, MCA, is amended to read:

"**75-1-103. Policy.** (1) The legislature, recognizing the profound impact of ~~man's~~ human activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, ~~and~~ recognizing ~~further~~ the critical importance of restoring and maintaining environmental quality to the overall welfare and human development, ~~of man~~ and further recognizing that governmental regulation may unnecessarily restrict the use and enjoyment of private property, declares that it is the continuing policy of the state of Montana, in cooperation with the federal government, ~~and~~ local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which ~~man~~ humans and nature can coexist in productive harmony, to recognize the right to use and enjoy private property free of undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans.

(2) In order to carry out the policy set forth in parts 1 through 3, it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources ~~to the end~~ so that the state may:

(a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) ~~assure~~ ensure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) protect the right to use and enjoy private property free of undue government regulation;

~~(d)~~(e) preserve important historic, cultural, and natural aspects of our unique heritage and maintain, wherever possible, an environment ~~which~~ that supports diversity and variety of individual choice;

~~(e)~~(f) achieve a balance between population and resource use ~~which~~ that will permit high standards of living and a wide sharing of life's amenities; and

~~(f)~~(g) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person ~~shall be~~ is entitled to a healthful environment, that each person is entitled to use and enjoy that person's private property free of undue government regulation, and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

Section 3. Section 75-1-201, MCA, is amended to read:

"**75-1-201. General directions -- environmental impact statements.** (1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state ~~shall~~ must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) all agencies of the state, except as provided in subsection (2), shall:

(i) ~~utilize~~ use a systematic, interdisciplinary approach ~~which~~ that will ~~insure~~ ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking ~~which~~ that may have an impact on ~~man's~~ the environment;

(ii) identify and develop methods and procedures ~~which~~ that will ~~insure~~ ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property, AS

PROVIDED IN SUBSECTION (1)(B)(IV)(D);

~~(iii)~~(iv) include in every recommendation or report on proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects ~~which~~ that cannot be avoided should the proposal be implemented;

(C) alternatives to the proposed action;

(D) any regulatory impacts on private property rights, including:

~~(I)~~ whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been ~~implemented; and~~ ANALYZED. THE ANALYSIS IN THIS SUBSECTION (1)(B)(IV)(D) NEED NOT BE PREPARED IF THE PROPOSED ACTION DOES NOT INVOLVE THE REGULATION OF PRIVATE PROPERTY.

~~(II) whether state government may be liable for compensation to a private property owner for regulatory takings of private property as required by the 5th and 14th amendments to the U.S. constitution or Article II, section 29, of the Montana constitution;~~

~~(D)~~(E) the relationship between local short-term uses of ~~man's~~ the environment and the maintenance and enhancement of long-term productivity; and

~~(E)~~(F) any irreversible and irretrievable commitments of resources ~~which~~ that would be involved in the proposed action should it be implemented;

~~(iv)~~(v) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal ~~which~~ that involves unresolved conflicts concerning alternative uses of available resources;

~~(v)~~(vi) recognize the national and long-range character of environmental problems and, ~~where~~ when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of ~~mankind's~~ the world environment;

~~(vii)~~(vii) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

~~(viii)~~(viii) initiate and ~~utilize~~ use ecological information in the planning and development of resource-oriented projects; and

~~(viii)~~(ix) assist the environmental quality council established by 5-16-101; and

(c) prior to making any detailed statement as provided in subsection (1)(b)~~(iii)~~(iv), the responsible state official shall consult with and obtain the comments of any state agency ~~which~~ that has jurisdiction by law or special expertise with respect to any environmental impact involved. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved. Copies of ~~such~~ the statement and the comments and views of the appropriate state, federal, and local agencies ~~which~~ that are authorized to develop and enforce environmental standards ~~shall~~ must be made available to the governor, the environmental quality council, and the public and ~~shall~~ must accompany the proposal through tha existing agency review processes.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

~~(3) (a) Until the board of oil and gas conservation adopts a programmatic environmental statement, but no later than December 31, 1989, the issuance of a permit to drill a well for oil or gas is not a major action of state government as that term is used in subsection (1)(b)(iii).~~

~~(b) The board of oil and gas conservation shall adopt a programmatic statement by December 31, 1989, that must include but not be limited to:~~

~~(i) such environmental impacts as may be found to be associated with the drilling for and production of oil and gas in the major producing basins and ecosystems in Montana;~~

~~(ii) such methods of accomplishing drilling and production of oil and gas as may be found to be necessary to avoid permanent impairment of the environment or to mitigate long-term impacts so that the environment and renewable resources of the ecosystem may be returned to either conditions similar to those existing before drilling or production occurs or conditions that reflect a natural progression of environmental change;~~

~~(iii) the process that will be employed by the board of oil and gas conservation to evaluate such environmental impacts of individual drilling proposals as may be found to exist;~~

~~(iv) an appropriate method for incorporating such environmental review as may be found to be necessary into the board's rules and drill permitting process and for accomplishing the review in an expedient manner;~~

~~(v) the maximum time periods that will be required to complete the drill permitting process,~~

~~including any environmental review; and~~

~~(vi) a record of information and analysis for the board of oil and gas conservation to rely upon in responding to public and private concerns about drilling and production.~~

~~(c) The governor shall direct and have management responsibility for the preparation of the programmatic statement, including responsibility on behalf of the board of oil and gas conservation for the disbursement and expenditure of funds necessary to complete the statement. The facilities and personnel of appropriate state agencies must be used to the extent the governor deems necessary to complete the statement. The governor shall forward the completed draft programmatic statement to the board of oil and gas conservation for hearing pursuant to the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4. Following completion of a final programmatic statement, the governor shall forward the statement to the board for adoption and use in the issuance of permits to drill for oil and gas.~~

~~(d) Until the programmatic environmental statement is adopted, the board of oil and gas conservation shall prepare a written progress report after each regular meeting of the board and after any special board meeting that addresses the adoption or implementation of the programmatic environmental statement. A copy of each report must be sent to the environmental quality council.~~"

NEW SECTION. **Section 4. Private property protection -- ongoing programs of state government.** Nothing in [sections 1 through 3] expands or diminishes private property protection afforded in the U.S. or Montana constitutions. Nothing in [sections 1 through 3] may be construed to preclude ongoing programs of state government pending the completion of any statements that may be required by [sections 1 through 3].

-END-

SENATE BILL NO. 288

INTRODUCED BY KEATING, CURTISS, MILLS, BENEDICT, FELAND, MOHL, MCGEE, STOVALL, TASH, BRAINARD, TAYLOR, BURNETT, HARP, GAGE, CRISMORE, AKLESTAD, SWYSGOOD, DEVLIN

A BILL FOR AN ACT ENTITLED: "AN ACT ~~EXEMPTING CERTAIN ACTIONS BY AGENCIES OF STATE GOVERNMENT FROM REQUIREMENTS OF THE MONTANA ENVIRONMENTAL POLICY ACT; ALLOWING AGENCIES TO FIND ON A CASE-BY-CASE BASIS THAT AN EXEMPTED ACTION OR COMBINATION OF ACTIONS IS A MAJOR ACTION SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT; REQUIRING AGENCIES TO ADOPT THIS FINDING AS A DECLARATORY RULING PURSUANT TO THE MONTANA ADMINISTRATIVE PROCEDURE ACT~~ CLARIFYING THE BURDEN OF PROOF FOR ACTIONS IN WHICH AN AGENCY DETERMINES NOT TO CONDUCT AN ENVIRONMENTAL IMPACT STATEMENT; EXEMPTING THE LEGISLATURE FROM THE PROVISIONS OF THE MONTANA ENVIRONMENTAL POLICY ACT; AND AMENDING ~~SECTIONS 2-4-501 AND~~ SECTION 75-1-201, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-1-201, MCA, is amended to read:

"**75-1-201. General directions -- environmental impact statements.** (1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state ~~shall~~ must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) all agencies of the state, except THE LEGISLATURE AND EXCEPT as provided in ~~subsection subsections~~ SUBSECTION (2) ~~and (3)~~, shall:

(i) ~~utilize~~ use a systematic, interdisciplinary approach ~~which~~ that will ~~insure~~ ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking ~~which~~ that may have an impact on ~~man's~~ the environment;

(ii) identify and develop methods and procedures ~~which~~ that will ~~insure~~ ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(iii) include in ~~every~~ each recommendation or report on proposals for projects, programs, ~~legislation,~~

and other major actions of state government significantly affecting the quality of the human environment~~,~~ a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects ~~which~~ that cannot be avoided ~~should~~ if the proposal ~~be~~ is implemented;

(C) alternatives to the proposed action;

(D) the relationship between local short-term uses of ~~man's~~ the environment and the maintenance and enhancement of long-term productivity; and

(E) any irreversible and irretrievable commitments of resources ~~which~~ that would be involved in the proposed action ~~should~~ if it ~~be~~ is implemented;

(iv) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal ~~which~~ that involves unresolved conflicts concerning alternative uses of available resources;

(v) recognize the national and long-range character of environmental problems and, ~~where~~ when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of ~~mankind's~~ the world environment;

(vi) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(vii) initiate and ~~utilize~~ use ecological information in the planning and development of resource-oriented projects; and

(viii) assist the environmental quality council established by 5-16-101; and

(c) prior to making any detailed statement as provided in subsection (1)(b)(iii), the responsible state official shall consult with and obtain the comments of any state agency ~~which~~ that has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of ~~such~~ the statement and the comments and views of the appropriate state, federal, and local agencies ~~which~~ that are authorized to develop and enforce environmental standards ~~shall~~ must be made available to the governor, the environmental quality council, and the public and ~~shall~~ must accompany the proposal through the existing agency review processes.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1

through 3.

~~(3) (a) Until the board of oil and gas conservation adopts a programmatic environmental statement, but no later than December 31, 1989, the issuance of a permit to drill a well for oil or gas is not a major action of state government as that term is used in subsection (1)(b)(iii).~~

~~(b) The board of oil and gas conservation shall adopt a programmatic statement by December 31, 1989, that must include but not be limited to:~~

~~(i) such environmental impacts as may be found to be associated with the drilling for and production of oil and gas in the major producing basins and ecosystems in Montana;~~

~~(ii) such methods of accomplishing drilling and production of oil and gas as may be found to be necessary to avoid permanent impairment of the environment or to mitigate long-term impacts so that the environment and renewable resources of the ecosystem may be returned to either conditions similar to those existing before drilling or production occurs or conditions that reflect a natural progression of environmental change;~~

~~(iii) the process that will be employed by the board of oil and gas conservation to evaluate such environmental impacts of individual drilling proposals as may be found to exist;~~

~~(iv) an appropriate method for incorporating such environmental review as may be found to be necessary into the board's rules and drill permitting process and for accomplishing the review in an expedient manner;~~

~~(v) the maximum time periods that will be required to complete the drill permitting process, including any environmental review; and~~

~~(vi) a record of information and analysis for the board of oil and gas conservation to rely upon in responding to public and private concerns about drilling and production.~~

~~(c) The governor shall direct and have management responsibility for the preparation of the programmatic statement, including responsibility on behalf of the board of oil and gas conservation for the disbursement and expenditure of funds necessary to complete the statement. The facilities and personnel of appropriate state agencies must be used to the extent the governor deems necessary to complete the statement. The governor shall forward the completed draft programmatic statement to the board of oil and gas conservation for hearing pursuant to the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4. Following completion of a final programmatic statement, the governor shall forward the statement to the board for adoption and use in the issuance of permits to drill for oil and gas.~~

~~(d) Until the programmatic environmental statement is adopted, the board of oil and gas conservation shall prepare a written progress report after each regular meeting of the board and after any special board meeting that addresses the adoption or implementation of the programmatic environmental statement. A copy of each report must be sent to the environmental quality council.~~

~~(3) An agency of the state is exempt from the provisions of parts 1 through 3 when undertaking an action that involves the issuance of a lease, permit, license, easement, certificate, or other approval, entitlement for use, or permission to act, except that an agency may, in its discretion, on a case-by-case basis, find that an action or a combination of actions constitutes a major action significantly affecting the quality of the human environment as specified in subsection (1)(b)(iii). In order to make this finding, the agency shall issue a declaratory ruling under Title 2, chapter 4, part 5, of the Montana Administrative Procedure Act. If an agency makes this finding, parts 1 through 3 are applicable to the action or combination of actions.~~ IN ANY ACTION CHALLENGING OR SEEKING REVIEW OF AN AGENCY'S DETERMINATION THAT A STATEMENT PURSUANT TO SUBSECTION (1)(B)(III) IS NOT REQUIRED, THE BURDEN OF PROOF IS ON THE PERSON CHALLENGING THE DECISION. A COURT MAY NOT SET ASIDE THE AGENCY'S DECISION UNLESS IT FINDS THAT THERE IS CLEAR AND CONVINCING EVIDENCE THAT THE DECISION WAS ARBITRARY OR CAPRICIOUS OR NOT IN COMPLIANCE WITH LAW."

~~**Section 2.** Section 2-4-501, MCA, is amended to read:~~

~~"2-4-501. Declaratory rulings by agencies. (1) Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency.~~

~~(2) To make a finding under 75-1-201(3), an agency shall issue a declaratory ruling.~~

~~(3) A copy of a declaratory ruling must be filed with the secretary of state for publication in the register. A declaratory ruling or the refusal to issue such a that ruling shall be is subject to judicial review in the same manner as decisions or orders in contested cases."~~

-END-

HOUSE BILL NO. 274

INTRODUCED BY WAGNER, TASH, ELLIS, M. HANSON, DEBRUYCKER

A BILL FOR AN ACT ENTITLED: "AN ACT GRANTING THE DEPARTMENT OF STATE LANDS BROADER DISCRETION TO EXPEDITE SALES OF STATE TIMBER IN EMERGENCY SITUATIONS AND LIMITED ACCESS OPPORTUNITY SITUATIONS; EXEMPTING CERTAIN LIMITED ACCESS OPPORTUNITY TIMBER SALES FROM THE BID PROCESS REQUIREMENTS; EXEMPTING CERTAIN EMERGENCY AND LIMITED ACCESS OPPORTUNITY TIMBER SALES FROM ~~CERTAIN ENVIRONMENTAL IMPACT STATEMENT PROVISIONS OF~~ THE MONTANA ENVIRONMENTAL POLICY ACT; AND AMENDING SECTION 77-5-201, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 77-5-201, MCA, is amended to read:

"**77-5-201. Sale of timber.** (1) Under the direction of the board, the department may sell the timber crop and other crops of the forests after examination, estimate, appraisal, and report and under ~~such~~ ANY rules ~~as may be~~ established by the board.

(2) Timber proposed for sale in excess of 100,000 board feet ~~shall~~ must be advertised in a paper of the county in which the timber is situated for a period of at least 30 days, during which time the department ~~shall~~ must receive sealed bids up to the hour of the closing of the bids, as specified in the notice of sale.

(3)(a) In cases of emergency due to fire, insect, fungus, parasite, or blowdown or in cases when the department is required to act immediately to take advantage of ~~a limited access opportunity~~ ACCESS GRANTED BY PERMISSION OF AN ADJOINING LANDOWNER, timber proposed for sale not in excess of 1 million board feet may be advertised by invitation to bid for a period of not less than 10 days. The department may reject any or all bids, upon approval of the board, or it shall award the sale to the highest responsible bidder.

(b) (I) In cases when the department is required to act immediately to take advantage of ~~a limited access opportunity~~ ACCESS GRANTED BY PERMISSION OF AN ADJOINING LANDOWNER and there is only one potential buyer with legal access, the department may negotiate a sale of timber not in excess of 1 million board feet without offering the timber for bid if the sale is for fair market value.

(II) THE PROVISIONS OF SUBSECTION (3)(B)(I) DO NOT APPLY TO SITUATIONS WHEN THE ONLY ACCESS IS TOTALLY CONTROLLED BY A POTENTIAL PURCHASER OF THE TIMBER, IN WHICH CASE THE DEPARTMENT SHALL SEEK TO NEGOTIATE PERMANENT, RECIPROCAL ACCESS.

(c) In the situations described in ~~this subsection (3)~~ SUBSECTIONS (3)(A) AND (3)(B)(I), the department is not required to comply with the provisions of 75-1-201(1) TO THE EXTENT THAT COMPLIANCE IS PRECLUDED BY LIMITED TIME AVAILABLE TO TAKE ADVANTAGE OF THE SALES OPPORTUNITIES DESCRIBED BY THIS SUBSECTION (3)."

-END-

SENATE BILL NO. 347

INTRODUCED BY CRISMORE, BECK, SWYSGOOD, HARP, MESAROS, MOHL, AKLESTAD, GAGE

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING THE DEPARTMENT OF STATE LANDS TO NEGOTIATE RECIPROCAL ACCESS TO FACILITATE THE MANAGEMENT OF ISOLATED STATE FOREST LANDS; ALLOWING THE BOARD TO WAIVE SURVEY REQUIREMENTS; AND DEFINING "ANALYSIS REQUIREMENTS"."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Management of isolated forest lands -- ~~reciprocal~~ access.** (1) To facilitate the management of isolated tracts of classified forest lands, the department may negotiate reciprocal access agreements, which may include easements. FOR AN EASEMENT GRANTED PURSUANT TO THIS SUBSECTION, THE BOARD MAY WAIVE ALL OR A PORTION OF THE SURVEY REQUIREMENTS OF 77-2-102, SUBJECT TO ANY CONDITIONS THAT THE BOARD MAY IMPOSE.

(2) In granting ~~reciprocal~~ access, the department is not required to analyze or consider the potential impacts of activities that may occur on private or federal lands in conjunction with or as a result of granting ~~reciprocal~~ access.

NEW SECTION. **Section 2. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 77, chapter 5, and the provisions of Title 77, chapter 5, apply to [section 1].

-END-